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ABSTRACT

Structural reform in higher education collective bargaining is examined in these conference proceedings, along with recent state bargaining legislation, and legal, union, and management views concerning sex discrimination in higher education. The 19 article topics and authors include: the problem of reshaping the fringe package (Claude Campbell); cafeteria or flexible benefit plans (Jerry Veldof); whether tenure is an obstacle to reform (Dena Elliott Benson) and (Margaret Schmid); concession bargaining (Michael B. Rosen); concession bargaining in historical perspective (Irwin Yellowitz); concession bargaining at Monmouth College (Philip C. Donahue); merit pay (Ted Hollander, Judith Turnbull) and (J. N. Musto); comparable worth practice in Minnesota (Nina Rothchild); sex discrimination overview (Bernice Resnick Sandler); emerging case law of sex discrimination (Judith Vladeck) and (Mike Cecere); statistical issues in discrimination litigation (Mary W. Gray); grievance claims (Jennie Farley); the status of Ohio's Public Employee Bargaining Law (D. Benson); the status of Illinois' Educational Labor Relations Act (Margaret Schmid); research on finance and environments at 93 colleges and implications for collective bargaining (Richard E. Anderson); and research on interpretive strategy and institutional vitality (Ellen Earle Chaffee). (SW)

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STRUCTURAL REFORM IN HIGHER EDUCATION COLLECTIVE BARGAINING

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Proceedings
Twelfth Annual Conference
April 1984

JOEL M. DOUGLAS, *Editor*

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I. INTRODUCTION

INTRODUCTION

Planning the Annual Conference is one of the more satisfying aspects of serving as Director of the National Center. One is able to sift through the suggestions and comments of the Center's Advisory Committees and from them work towards a consensus program. As the planning process for this conference developed, it became apparent that many new areas were emerging as critical problems for those involved in academic collective bargaining. Structurally, the process was changing. New topics, vital to employment relationships in colleges and universities, were becoming an increasing problem. We decided to devote our attention to these structural changes.

DESIGN OF THE CONFERENCE

Six areas of reform were identified for examination. Several of these are national problems that extend far beyond academic collective bargaining. However, we felt that a microscopic analysis within the confines of the academy was necessary. These included Sex Discrimination and Comparable Worth. Two of the topics, Merit Pay and Tenure, were mentioned in virtually every report on the subject of educational reform. Most authors suggested using merit pay as an incentive in achieving educational excellence. At the same time, many of these same reformers saw tenure as an obstacle to achieving this goal. We decided to examine both of these in the reform context. The last two topics examined related to the economics of the workplace, namely, Concession Bargaining and Fringe Packages. Both topics have received a great deal of media coverage on the national level. We chose to examine them as pertains to our more limited environs.

The conference began with an update of academic collective bargaining during 1983. As a special feature, we examined the new legislation in Ohio and Illinois; Dena Benson presented an overview of Ohio Senate Bill 133, while Margaret Schmid analyzed Illinois House Bill 1530. The ability to have practitioners from each of those states present their views was extremely beneficial as both Benson and Schmid were in on the early bill-drafting stages. The first plenary session featured two academic researchers, Dick Anderson of Teachers College and Ellen Chaffee of NCHEMS. Both presented a review and findings of the research that they are currently engaged in. The other plenary session was devoted to an examination of sex discrimination in higher education. Bernice Sandler set the stage with an overview of the problem. A legal perspective, the union view was espoused by Judith Vladeck, while management's views were presented by Mike Cecere. Nina Rothchild, Commissioner of the Minnesota Department of Employee Relations, discussed that state's experience with comparable worth. Completing this area, Mary Gray analyzed the types of evidence used in proving cases of sex discrimination, while Jennie Farley discussed her findings with respect to sex discrimination grievance claims in higher education.

Three small group sessions were scheduled. In the first, three academic unionists, Claude Campbell of the PSC, Antonia Moran of the AAUP and Jerry Veldof of the NJEA analyzed various new trends in the fringe package. The second session was devoted to the question of "Is Tenure and Obstacle to Reform?" Dena Benson and Margaret Schmid shared the floor in that session. Concession Bargaining formed the focal point of the third session. Irwin Yellowitz presented an historical overview, while Phil Donahue and Mike Rosen responded from a union and management perspective.

The luncheon symposium was devoted to an examination of merit pay. Ted Hollander, Chancellor of the New Jersey Department of Higher Education, shared his perspective on the problem, while J. N. Musto presented his thoughts as a union executive director.

As we have done so often in the past, we drew upon both the old and new guard at Baruch College for moderator and discussant roles. These slots were graciously and expertly filled by Fred Lane, Fran Barasch, Sam Ranhand, Joyce Barrett, Esther Liebert and Ted Lang. Other moderators and discussants included those who we affectionately refer to as the old guard. In this category were Ben Mintz and Dave Newton. Joe Hankin, who is neither a member of the old guard or Baruch faculty member but certainly qualifies as a friend of the Center, moderated the Monday morning plenary session. As he has so ably done in the past, Aaron Levenstein moderated the luncheon symposium.

THE PROGRAM

Set forth below is the program of the Twelfth Annual Conference of the National Center which lists the topics and speakers included in this volume of the Proceedings. Some editorial liberty was taken with respect to format and background material in order to ensure readability and consistency.

Monday Morning, April 30, 1984

8:30 Registration and Coffee Hour

9:30 WELCOME
Joel Segall, President, Baruch College, CUNY

COLLECTIVE BARGAINING UPDATE 1984
Joel M. Douglas, Director, NCSCBHEP

STATUS OF OHIO COLLECTIVE BARGAINING LAW - SENATE BILL 133
Dena Benson, Esq.
Smith & Schnacke
Dayton, Ohio

STATUS OF ILLINOIS EDUCATIONAL LABOR RELATIONS ACT HB1530
Margaret Schmid, President
University Professionals of Illinois
IFT/AFT

10:45 PLENARY SESSION A
REFORMING THE SYSTEM

Speakers: Dick Anderson, Chairman
Dept. of Higher and Adult Ed.
Teachers College, Columbia University

Ellen Chaffee, Senior Associate
National Center for Higher Education
Management Systems, Boulder, Colorado

Discussant: Frederick Lane, Professor
Public Administration
Baruch College, CUNY

Moderator: Joseph N. Hankin, President
Westchester Community College

12:45 LUNCHEON

Topic: REFORM: LINKING THE EDUCATIONAL SYSTEMS

Speaker: Anthony J. Alvarado, Chancellor
of the Board of Education of the
City of New York

Moderator: Joel M. Douglas

Monday Afternoon, April 30, 1984

2:30 SMALL GROUP SESSIONS—STRUCTURAL REFORMS

Group A: RESHAPING THE FRINGE PACKAGE

Speakers: Claude Campbell, Vice President
Professional Staff Congress (AFT/AAUP)

Antonia Moran, AAUP Coordinator
State of Connecticut

Jerry Veldof, Field Rep., Higher
Ed. N. J. Ed. Assoc./NEA

Discussant: Frances Barasch, Prof. of English
Chairperson, Baruch Chapter
PSC/AFT/AAUP

Moderator: Samuel Ranhand, Prof. of Management
Baruch College, CUNY

Group B: IS TENURE AN OBSTACLE TO REFORM?

Speakers: Dena Benson, Esq.
Smith & Schnacke, Dayton, Ohio

Margaret Schmid, President
University Professionals of Illinois
IFT/AFT

Discussants: Joyce E. Barrett, Esq.
Baruch College, PSC/CUNY Office of
Legal Affairs

Esther Liebert, Asst. Admin. Employee
and Labor Relations
Baruch College, CUNY

Moderator: Bernard Mintz, Exec. Asst. to the
President, William Paterson College

Group C: CONCESSION BARGAINING

Speakers: Philip Donahue, Assoc. Professor
of History, Chairperson, AAUP
Chapter, Monmouth College, N. J.

Michael Rosen, Esq.
Associate General Counsel
Boston University

Irwin Yellowitz, Prof. of History
City College, CUNY

Discussant: David Newton, Vice Chancellor
Long Island University

Moderator: Theodore H. Lang, Prof. of Education
Baruch College, CUNY

Tuesday Morning, May 1, 1984

9:30 PLENARY SESSION B
SEX DISCRIMINATION

PART I - SEX DISCRIMINATION: OVERVIEW

Speaker: Bernice R. Sandler, Exec. Director
Project on the Status and Education
of Women

PART II - THE EMERGING CASE LAW OF SEX DISCRIMINATION

Speakers: Judith Vladeck, Esq.
Vladeck, Waldman, Elias & Engelhard
New York City

Mike Cecere, Esq.
Jackson, Lewis, Schnitzler & Krupman
New York City

PART III - COMPARABLE WORTH: THE MINNESOTA EXPERIENCE

Speaker: Nina Rothchild, Commissioner
State of Minnesota, Department of
Employee Relations

PART IV - STATISTICAL EVIDENCE: A LEGAL AND MATHEMATICAL PERSPECTIVE

Speaker: Mary Gray, Prof., American University
Former Chair, AAUP Committee "W" on
the Status of Women in the Academic
Profession

PART V - GRIEVANCE CLAIMS: WHO IS WINNING?

Speaker: Jennie Farley, Professor
School of Industrial and Labor
Relations, Cornell University

Tuesday Afternoon, May 1, 1984

12:45 LUNCHEON SYMPOSIUM

Topic: THE MERITS OF MERIT PAY

Speakers: Ted Hollander, Chancellor
N.J. Dept. of Higher Education

J. N. Musto, Exec. Director
Univ. of Hawaii, Professional
Assembly, NEA/AAUP

Moderator: Aaron Levenstein, Professor Emeritus
Baruch College, CUNY

3:30 SUMMATION AND ADJOURNMENT
Joel M. Douglas

A WORD ABOUT THE NATIONAL CENTER

The National Center is an impartial, nonprofit educational institution serving as a clearinghouse and forum for those engaged in collective bargaining (and the related processes of grievance administration and arbitration) in colleges and universities. Operating on the campus of Baruch College, City University of New York, it addresses its research to scholars and practitioners in the field. Membership consists of institutions and individuals from all regions of the U.S. and Canada. Activities are financed primarily by membership, conference and workshop fees, foundation grants, and income from various services and publications made available to members and the public.

Among the activities are:

- The two-day Annual Spring Conference
- Publication of the proceedings of the Annual Conference, containing texts of all major papers.
- Issuance of an Annual Directory of Faculty Contracts and Bargaining Agents.

- Bibliography of Collective Bargaining in Higher Education.
- The National Center Newsletter, issued five times a year, providing in depth analysis of trends, current developments, major decisions of courts and regulatory bodies, updates of contract negotiations and selection of bargaining agents, reviews and listings of publications in th field.
- Monographs - complete coverage of a major problem or area, sometimes of book length.
- Regional workshops, using a hands-on format to provide training in subjects like negotiating a contract, grievance-processing and arbitration, implementation and administration of contracts.
- Elias Lieberman Higher Education Contract Library maintained by the National Center, containing more than 350 college and university collective bargaining agreements, and important books and relevant research reports.
- BRAIN (Baruch Retrieval of Automated Information for Negotiations), a Contract DataBank maintained jointly with McGill University, providing for retrieval and and analysis of specific clauses.
- Depository of arbitration awards in higher education housed at the National Center and established with the cooperation of the American Arbitration Association.

ACKNOWLEDGMENTS

Publishing schedules play a critical role in the life cycle of an organization. So it is with the publication of the Proceedings, for it is with this project that we close the books on the previous Annual Conference. The Proceedings continue to contain the most current information available in the field and remains as one of the more significant publications in academic collective bargaining.

Publishing, in a small organization such as ours, is truly a team effort. Everyone works on various facets of the project. Brenda Daniels, once again, transcribed the speeches for which no printed copy was available. Proofreading was a team project but mainly fell to Ruby N. Hill, Susan Campbell, Brenda Daniels and Elisabeth Kotch. Ruby and Brenda operated our Microcomputer system and, in essence, are responsible for the final printed copy of our Proceedings. Evan G. Mitchell assisted me with the editing function and supervised the production of this entire project.

As I have said on numerous other occasions, for any errors or omissions, we apologize. For the success of this project and the conference itself, I gratefully acknowledge all of the above.

J. M. D.

II. COLLECTIVE BARGAINING UPDATE

A. OHIO'S PUBLIC EMPLOYEE BARGAINING LAW

B. ILLINOIS EDUCATIONAL LABOR RELATIONS ACT

LEGISLATIVE UPDATE

A. STATUS OF OHIO'S PUBLIC EMPLOYEE BARGAINING LAW
SENATE BILL 133

Dena Elliott Benson, Esq.
Smith and Schnacke
Dayton, Ohio

INTRODUCTION

On June 30, 1983, Ohio's General Assembly enacted Senate Bill 133, now Ohio Rev. Code Chapter 4117. This public employee bargaining law, which became fully effective on April 1, 1984, gave public employees the right to collectively bargain and, with the exception of safety forces, the right to strike. The new law is patterned on the National Labor Relations Act and the Labor Management Relations and Disclosure Act with certain changes particularly favorable to unions. First, I will present a number of the more interesting provisions which affect public employee bargaining in general. Then I will focus on the provisions which deal with faculty.

UNIT RECOGNITION

Two significant departures from private sector law substantially affect the recognition process. In the private sector an employer who is presented with a demand for recognition may refuse to recognize the union. The union then has the burden of filing for an election with the NLRB. That was the holding of the Supreme Court's decision in *Linden Lumber v. NLRB*, 419 U.S. 817 (1974). In the public sector in Ohio, *just the opposite is true*. When the union presents its evidence of majority support to the employer in Ohio, the employer must notify its employees and the State Employment Relations Board (SERB) that the claim of exclusive representation has been made. If no objection is raised during the twenty-one day period following the claim, SERB is directed to automatically certify the unit. § 4117.05(A) (2) (b).

Secondly, Ohio has codified *Gissel* majority bargaining orders. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The statute provides that SERB may certify a union "as an exclusive representative if it determines that a free and untrammeled election cannot be conducted because of the employer's unfair labor practices and that at one time, the employee organization had the support of the majority of the employees in the unit." § 4117.05(A) (2). Therefore, public employees in

Ohio, unlike private sector employees, will not be litigating the majority bargaining order. Whether the minority bargaining order that we are still seeing litigated in the private sector can occur in Ohio remains to be seen. Conair Corp., 261 NLRB 1189 (1982), enforcement denied, 114 LRRM 3169 (D.C. Cir. 1983); United Dairy Farmers Corporative Association, 257 N.L.R.B. No. 129 (1981), on remand from the Third Circuit, 633 F.2d 1054 (1979). The position that many of us are taking is that the authorization of the majority bargaining order is an implied prohibition of a minority bargaining order.

SCOPE OF NEGOTIATIONS

Another substantial departure from the private sector law is that Ohio law mandates certain clauses be in the collective bargaining agreement. Once an agreement is reached, the contract must contain an authorization for dues deduction, §4117.09(B) (2), and must contain a grievance procedure which "may culminate with final and binding arbitration." §4117.09(B) (1). No bargaining agreement in Ohio can last longer than 3 years as the initial period, but it may be extended for a greater length of time. 4117.09(D). No employee may strike during the life of a collective bargaining agreement. § 4117.14(B) (3).

The law also permits the following clauses. The agreement may contain an agency shop clause. §41176.09(C). If an agency shop clause is included, non-members must pay a fair share fee to the union and an employee whom SERB determines is a conscientious objector must pay an amount equal to his fair-share fee to a charitable, non-religious, tax-exempt organization. However, he is not free to designate an organization of his own choosing. The employee and the union must agree upon which organization will receive the fee. The fair share fee reduction is automatic, not requiring written authorization of the employee. §4117.09(C).

IMPASSE RESOLUTION AND STRIKES

The Ohio statute also provides a time-table for bargaining, giving the parties at least 90 days to negotiate an initial agreement or at least 60 days before an existing contract expires to negotiate a successor agreement or a modification of an existing agreement. If within the first 15 of the minimum 60 days of bargaining (45 days if negotiating an initial agreement), the parties do not agree to an alternative dispute resolution procedure, the procedure under the statute applies. That procedure involves SERB intervention, a SERB-appointed mediator, and fact-finding. Fact-finding recommendations will be binding on the parties unless rejected by a 3/5 vote of the total membership of the legislative body or the union. § 4117.14(C) (5) and (6). The Act provides 10-days notice of intent to strike, and the right to strike if no agreement is reached. Binding impasse arbitration is provided for safety forces because they do not have the right to strike. §4117.14.

A strike which creates a "clear and present danger to the health or safety of the public" may be temporarily restrained for 72 hours and enjoined until an agreement is reached but no longer than 60 days. After 60 days, no court may further enjoin the strike. §4117.16.

The Ohio statute imposes a duty to bargain over wages, hours, or terms and conditions of employment but reserves matters ordinarily included in a management rights clause as permissive subjects of bargaining. §4117.08(C). If a permissive subject is included in the contract, later negotiation over the continuation, modification, or deletion of that subject from an existing agreement is mandatory. §4117.08(A). In other words, the parties may not insist to impasse that a permissive subject be included, but once it becomes part of a contract, the parties may insist to impasse over continuing, modifying or deleting the matter.

THE YESHIVA ISSUE

A number of provisions in the Ohio statute expressly affect the state's institutions of higher education and their faculty. The most significant departure from private sector labor law is Ohio's statutory resolution of the Yeshiva issue. NLRB v. Yeshiva University, 444 U.S. 672 (1980). The authors of the original bill appear to have been unaware or unconcerned about this issue because the bill was silent on the matter. The Ohio State Bar Association's Labor Section Committee on public sector labor law studied the bill and submitted white papers to the General Assembly. As a member of that committee, I submitted a white paper on Yeshiva pointing out that the issue could be avoided by statutorily resolving it—one way or the other. The General Assembly resolved it in favor of faculty.

At Yeshiva, the unit of faculty members was deemed inappropriate because the faculty operated the institution through its governance structure by making recommendations on academic and, in the Court's view, managerial matters, which the administration adopted more than 90 percent of the time. At such a mature institution, virtually the entire faculty are management-level employees. In the aftermath of Yeshiva, faculty at many private institutions have been denied bargaining rights while their public sector counterparts have continued to enjoy those rights. Chapter 4117 appears to prevent Yeshiva-type analysis from having the same effect in Ohio.

In defining the appropriate bargaining unit, the Ohio statute, like the National Labor Relations Act, excludes supervisors and management-level employees. The definition of management-level employees tracks the language of the National Labor Relations Act, but the Yeshiva proviso states, "with respect to members of a faculty of a state institution of higher education, no person is a management-level employee because of his involvement in the formulation or implementation of academic or institution policy." §4117.01(K).

. Ohio's definition of a supervisor also closely parallels the private sector definition with certain significant exceptions. First, heads of departments or divisions in institutions of higher education are supervisors under Ohio law. §4117.01(F) (3). The Yeshiva proviso to the supervisor category states, "no other faculty member or group of faculty members is a supervisor solely because the faculty member or group of faculty members participate in decisions with respect to courses, curriculum, personnel or other matters of academic policy." §4117.01(F) (3). This language, as you know, comes directly from Representative Frank Thompson, Jr.'s bill before the 96th Congress. The ill-fated bill attempted to legislate Yeshiva out of the National Labor Relations Act. This language is an attempt to do the same thing in Ohio.

These Yeshiva provisions may well enable Ohio to avoid the private sector situation created in 1982 by the NLRB's decision, College of Osteopathic Medicine and Surgery. 265 N.L.R.B. No. 37, (1982). There, as you may recall, the faculty were deemed to be employees under the NLRA. They bargained an agreement, and in that agreement they won certain governance rights. Then, the NLRB said, in effect, you are now managers, and you may no longer compel your employer to bargain with you. If you should lose those governance rights and thereby cease to be managerial employees, you may then petition the Board for an election. In that situation, what may have been one of the most important reasons for organizing in the first place, the achievement of governance rights, could lead to the relinquishment of those rights. On the other hand, a college which wants to avoid the duty to bargain may have to share governance of the institution with the faculty. The choice between bargaining and governing imposed on private sector faculty is avoided by statute in Ohio's public sector institutions.

BARGAINING UNIT DETERMINATION

Aside from Yeshiva provisions, other sections of Ohio's law affect faculty. SERB may not designate as appropriate a bargaining unit that contains more than one institution of higher education, or a unit which would be inconsistent with the accreditation standards or interpretations of those standards governing the institution or any of its departments, schools, or colleges. Any branch or regional campus of a public institution of higher education is considered part of that institution. We will, therefore, not have a statewide faculty bargaining unit in Ohio. §4117.06(D) (4).

Another issue which has been subject not only to litigation but to some debate in the last few years is whether part-time faculty should be included in a unit of full-time faculty members. This issue is not open to debate in Ohio. The statute provides that part-time faculty members of an institution of higher education are not considered employees under the Act. Whether part-time faculty will be able to collectively bargain will depend upon the willingness of the college to engage in bargaining under Ohio's common law.

Ohio law provides the following persons are not statutory employees and, therefore, do not have the statutory right to bargain: "Students whose primary purpose is educational training, including graduate assistants or associates, residents, interns, or other students working as part-time public employees less than 50 percent of the normal year in the employee's bargaining unit." § 4117.01(11).

The National Center's data shows five public sector faculty units in Ohio are operating with expired contracts. Two units have contracts which will expire in 1985 and 1986. According to Jaqueline Keister, SERB's General Counsel, as of Friday, April 27, not a full month after the Act became effective, 153 voluntary recognition petitions and 275 petitions for election had been filed. Only one new faculty unit filed a request for voluntary recognition—Central State University at Wilberforce Ohio, an AAUP unit.

Almost 900 petitions, charges, and notices have been filed with SERB. The Board is operating with two unconfirmed members, William Sheehan and Helen Fix. The unconfirmed chairman, rumored to be resting in Florida, has been preparing for several weeks to face charges to remove him from office. Governor Celeste demanded the resignation of Chairman Theodore Dyke. Dyke refused. Former Attorney General William J. Brown is the Special Examiner. On May 3, a hearing is scheduled. Under the Act, a Board member may be removed only for "neglect of duty or malfeasance in office." §4117.02(A). Whether cause must be shown to remove an unconfirmed member seems to be an issue.

Although the Act has given faculty broad rights in Ohio, faculty members seem less anxious to exercise those rights than other public employees. SERB clearly has a heavy caseload. Not only are the 900 filings awaiting disposition, but SERB's rules are undergoing public hearing. Its authority and ability to invoke public confidence are at stake, particularly as it functions with two members, its chairman's position remaining precarious.

B. STATUS OF ILLINOIS EDUCATIONAL LABOR RELATIONS ACT - HB1530

Margaret Schmid
President
University Professions of Illinois, IFT/AFT

INTRODUCTION

The most interesting question concerning the Illinois Educational Labor Relations Act is the question of why it took so long to pass.

When the collective bargaining law took effect on January 1, 1984, we were in a situation in which approximately 85 percent of the elementary and secondary teachers in Illinois were already involved in collective bargaining. Fifty percent of community college faculty, 20 percent of public university faculty, civil service employees in the public universities and academic support staff in the community colleges and elementary and secondary schools, were also engaged in the collective bargaining process.

POLITICAL AND LEGISLATIVE ASPECTS

Thus, in Illinois, the real question is a strictly political one. I want to begin by commenting on this matter a bit, because many of the questions about the implications of the Illinois law will be political as well.

The passage of a collective bargaining law in Illinois, something which has been attempted regularly since the 1950's, is actually part of the reorganization of Illinois politics currently underway. To a large extent this reorganization has to do with Chicago and, at least in media coverage, focuses on the mayor of Chicago. The reorganization, which has many important ramifications, is directly connected with passage of the collective bargaining bill in the following way.

There are two main reasons for Illinois' peculiar history of large-scale collective bargaining coupled with repeated defeats of collective bargaining legislation. One, the least important, has been the competition between the Illinois Federation of Teachers and the Illinois Education Association, each of which presented its own collective bargaining bill virtually every year. These bills contained important differences; the organizations fought to stalemate in the legislature every year, resulting in defeats of both bills. The major reason, however, has been the coalition of Republicans and Chicago and Cook County

Democrats which have been opposed to collective bargaining legislation for years.

You may have heard of Chicago as a labor town. You may even have that impression of it. But virtually all of the so-called bargaining in Chicago with Chicago city workers - with the exception of the teachers and the very recent additions of police and fire contracts - has been hand-shake bargaining. That is, there have been virtually no genuine written contractual agreements. Furthermore, there were very few if any actual grievance procedures, with the attendant rights and responsibilities which grievance procedures entail. Chicago hand-shake bargaining rested on the patronage system and was, in very large part, integrated into it.

With the change in Chicago politics and, therefore, Illinois politics that was evidenced by the election of Harold Washington as Mayor last year, came a breaking apart of some of the older alliances which were part of the Chicago hand-shake tradition of labor relations. It was this split among the Chicago and Cook County Democrats which finally allowed for the passage of collective bargaining legislation.

It is important to note as well that, under the very firm leadership of the Speaker of the House in the Illinois General Assembly, the IFT and the IEA were led to sit down together to negotiate a proposed education collective bargaining bill which both would support.

Thus we had, after years of legislative defeats, the very interesting occurrence of simultaneous passage and signing of both a collective bargaining bill for education supported by both education organizations and an all-public employee collective bargaining bill supported by most Democrats, the AFL-CIO, and the IFT.

The fact that we ended up with two collective bargaining bills passed by the legislature and signed by the Governor as opposed to one was itself the result of politics, as you would guess. In essence, the IEA wanted a bill that it could call its own, and did not want to be included in the general public employee bill because that was an AFL-CIO bill. Since Illinois has a Governor who has been close to the IEA, the resulting wheeling and dealing produced two bills.

I note all of this because, for those of you who follow labor law, it is going to make a significant difference that we have two bills. They are not the same in some important provisions, and I think we are going to see a lot of litigation as groups covered under one bill argue that procedures and interpretations estabished under the other bill should also apply to them, and so forth. In fact, people jokingly refer to these as lawyers' full employment bills, and we expect to see all kinds of creativity in the courts.

HIGHER EDUCATION COLLECTIVE BARGAINING

The key provisions in the Illinois bill are rather nicely outlined for you in the NCSCBHEP Newsletter which you have all received. It contains some of the major provisions from both the Illinois bill and the Ohio bill, and I commend it to you.

I do want to comment on a few specific items. One is the definition of who is covered by the law, focusing specifically on the inclusion of higher education.

There was an explicit attempt to exclude higher education from coverage under the law, not in the Legislature, but rather in the period between the passage of the bill by the Legislature and the Governor's signing of the bill. After substantial lobbying of the most clear political sort, higher education was retained in the bill, and thus we had an explicit and clear political decision to provide authority for collective bargaining in higher education.

THE *YESHIVA* ISSUE

We do not have a *Yeshiva* waiver of the sort that the Ohio bill does. However, the definitions of supervisor and manager are very narrowly drawn ones which the legislature intended to obviate *Yeshiva*-type problems.

On the whole issue of *Yeshiva*, by the way, the most explicitly political analysis appears to be in order. President Reagan intended to substantially weaken the National Labor Relations Board from a labor point of view, and he has done so very effectively. And, of course, we must consider the Supreme Court and the direction which it has taken as Reagan has had the opportunity to make some appointments. It is not surprising, thus, that - given the politics, not the facts - we had the original *Yeshiva* decision, and have now seen subsequent, very restrictive NLRB interpretations of the implications of that decision.

It follows from this, further, that if and when there were to be a significant state-level political attempt with sufficient political support, we would see *Yeshiva*-type actions in public higher education as well. And if there is not that kind of political climate and activity, we won't.

SCOPE OF NEGOTIATIONS

To return to the Illinois education collective bargaining law, however, let me continue.

The scope of the bill is, from our point of view, quite a good one. The only mandated item of bargaining is the requirement that contracts include a grievance procedure culminating in binding arbitration. The only prohibited item in bargaining is the prohibition against taking away, through negotiations, anything which is guaranteed by state statute. There is a reasonable management rights provision, which specifies that the impact of certain management decisions must be subject to bargaining, making the provision acceptable from a labor point of view.

THE RIGHT TO STRIKE

There is an explicit recognition of the right to strike, with certain procedures which must be followed. This, again, is spelled out in the Center's *Newsletter* which you have. I would note that, from our point of view, the explicit recognition of the right to strike is not quite as major a change as a number of management people in education in Illinois seem to believe. There has been a history of strikes in Illinois without explicit legal authorization. If people feel compelled to strike, they do; if they do not, they don't. It really hasn't mattered much that there has not been explicit legal authorization. I think, in general, that when a union is contemplating a strike, the major factor considered is whether the strike is truly necessary and has a reasonable chance of being won. Again, it is a more political than legal question. If anything, I would estimate that there will be fewer strikes than there used to be because of the requirement in the law that mediation be attempted before a strike occurs.

ADVANTAGES AND DISADVANTAGES

There probably will be some problems with this bill, as I think there are with all new laws, no matter how wonderful they might appear on paper.

One of them will be with time lines. There are quite a few time lines written into the body of the statute - 60 days before this, 45 days after that, 15 days here and there, and it is doubtful that they correspond too neatly with reality. I also think that we are going to see an unfortunate resort to the courts, in part because of some of the features of the bill; in part because we have two new and separate collective bargaining laws; and in part because there is a tendency to want to run to court on all kinds of issues in our society in any event. I only hope that this tendency can be limited, since it will be unfortunate, especially where collective bargaining is already established, to see the give and take of the bargaining process diverted into the courts.

A major advantage which passage of the law offers to those already in collective bargaining is that the law will help to end a particular kind of resort to the courts which has been troublesome, certainly from a labor point of view. That is, there has been an all too frequent resort to the court in disputes over the enforcement of contracts already agreed to.

Specifically, there has been a history of school boards at various levels taking arbitration awards to court and arguing that when they initially agreed to the contract language which has now been upheld by the arbitrator, they had engaged in an illegal delegation of power. In effect, boards have been asking courts to find that the boards themselves acted illegally when they made an agreement to do X, Y, or Z. One of the consequences of this has been people asking the state legislature to pass laws to resolve detailed specific problems which have eluded definitive resolution through the collective bargaining mechanism because of this back-door resort to the courts. The new law gives a clear statutory basis to collective bargaining agreements, and will greatly reduce ambiguity concerning the status of arbitration awards. I believe that labor and management alike will benefit from this.

The Illinois Educational Labor Relations Board was appointed after the law took effect, was confirmed about two months after the law took effect, and now has over 100 petitions before it. It is operating with two professional employees on contract, and does not even have the beginnings of its permanent professional staff. We're off to a slow start, but there is general satisfaction with the Board appointments, and things could be much worse.

ORGANIZING DRIVES

We have seen a great amount of organizing activity beginning. Those of you who are familiar with Illinois know that the IFT and IEA have been involved in an extensive contest in recent years with the IFT having successfully decertified the IEA in a number of elementary and secondary school districts. Passage of the law has accelerated that organizing contest.

Substantial organizing activity is occurring in Illinois community colleges, and we now also have active organizing going on at every public university in our state outside of the Board of Governors universities system, a part of my local in which we have had bargaining since 1976. My local's petition for an election for faculty and academic staff at the three Board of Regents universities was one of the first submitted to the new education labor board. Even at the Board of Governors universities we are conducting an organizing campaign to expand the currently established academic bargaining unit, a unit which was defined by the Board of Governors itself in 1976 and which, in our view, is unreasonably narrow.

Thus, we have a burst of organizing activity in Illinois, with extensive competition among organizations, including even some organizations which are not normally thought of as education unions or as educational employees organizations. And I note that this is all prior to the effective date of Illinois' general public employee collective bargaining law, which will take effect July 1. All in all, Illinois will be an interesting place to watch.

III. REFORMING THE SYSTEM

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REFORMING THE SYSTEM

A. A STUDY OF INSTITUTIONAL FINANCE AND ENVIRONMENTS IN THE 1970'S: IMPLICATIONS FOR COLLECTIVE BARGAINING IN THE 1980'S AND BEYOND

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INTRODUCTION

The 1960's and early 1970's were intoxicating years for American higher education. Growth was phenomenal. In 1960, there were 2000 degree granting colleges and universities. By 1976, there were 3000. The number of students rose from under four million to over eleven million during the same time span. Moreover, this growth was symptomatic of the faith Americans and their officials placed in the educational system to resolve internal and external threats to the nation. Lou Harris and Associates reported that in 1966, 61 percent of the public had a "great deal of confidence" in the leadership of higher education. As an example of the faith of elected officials, John F. Kennedy made an annual address to Congress on the state of education. His first message expressed the general expectations we held for our schools and colleges.

> Our progress as a nation can be no swifter than our progress in education. Our requirements for world leadership, our hopes for economic growth, and the demands of citizenship itself in an era such as this all require the maximum development of every young American's capacity. . . Our twin goals must be: A new standard of excellence in education—and the availability of such excellence to all who are willing and able to pursue it.

In the following years, Congress voted large sums of money for higher education including grants for construction, research, new programs, and student aid. Federal aid for students increased twenty-four fold (in constant dollars) between 1964 and 1976. During most of that time period, higher education was in the enviable position of being the beneficiary of increasing public support and confidence.

During the mid- and late nineteen-seventies, inflation heated up and public support cooled. In the constant dollars, federal student aid increased only eight percent between 1976 and 1981.[1] (The fact remains, however, that it did increase.) Paralleling the trend in student aid, total institutional revenues per student leveled off in the mid-1970's. (Again, it is notable that they did not decline in spite of generally perceived penury.) Public confidence was more mercurial and by the end of the decade only 34 percent of the public reported a "great deal of confidence" in higher education leadership.

In summary, the interval from the late 1960's to the beginning of the 1980's was a period in which higher education resources grew rapidly and then leveled off. Public confidence see-sawed but, on balance, declined significantly.

RESEARCH DESIGN

The Institute of Higher Education at Teachers College, Columbia University, reviewed college and university finances for 93 colleges and universities in detail over this period. Each institution was selected because it had administered the Educational Testing Service's Institutional Functioning Inventory (IFI) to a sample of its full-time faculty in the late 1960's or early 1970's. The IFI uses 132 items to assess campus functioning on eleven scales as listed below:

1. Intellectual-Aesthetic Extracurriculum refers to the availability of activities and opportunities for intellectual and aesthetic stimulation outside the classroom.

2. Freedom has to do with academic freedom for faculty and students as well as freedom in their personal lives for all individuals in the campus community.

3. Human Diversity has to do with the degree to which faculty and student body are heterogeneous in their backgrounds and present attitudes.

4. Concern for Improvement of Society refers to a desire among people at the institution to apply their knowledge and skills in solving social problems and prompting social change in America.

5. Concern for Undergraduate Learning describes the degree to which the college - in its structure, function, and professional commitment of faculty - emphasizes undergraduate teaching and learning.

6. Democratic Governance reflects the extent to which individuals in the campus community who are directly affected by a decision have an opportunity to participate in making the decision.

7. Meeting Local Needs refers to an institutional emphasis on providing educational and cultural opportunities for all adults in the surrounding area, as well as meeting needs for trained manpower on the part of local businesses and governmental agencies.

8. Self-Study and Planning has to do with the importance college leaders attach to continuous long-range planning for the total institution, and to institutional research needed in formulating and revising plans.

9. Concern for Advancing Knowledge reflects the degree to which the institution - in its structure, function, and professional commitment of faculty - emphasizes research and scholarship aimed at extending the scope of human knowledge.

10. Concern for Innovation refers, in its highest form, to an institutionalized commitment to experimentation with new ideas for educational practice.

11. Institutional Esprit refers to a sense of shared purpose and high morale among faculty and administrators.

In 1980-81, we readministered the IFI on each campus and to a similar sample of full-time faculty. In total, 6,905 full-time faculty responded to the IFI in the first wave and 5,113 in the second wave. Finally, thirteen colleges were visited and detailed contextual and organizational information was analyzed.

This data base gave us a unique opportunity to evaluate changes in faculty perceptions about their college's environment and how it functioned over the 1970's. In addition, we were able to compare these changes to changes in institutional finance. These analyses were completed and reported in detail in a monograph published by the Educational Testing Service. How can these data inform this conference? The data can be used to interpret the trends of the 1970's and to project changes in higher education in the 1980's and the ultimate impact on collective bargaining.

I am going to summarize the general descriptive findings of my study. Yet, the portrait I will paint is a familiar one. It shows that the 93 public and private, 2-year and 4-year colleges in our sample generally fit the commonly held perceptions of the national experience—both financially and educationally. I will then depart from the descriptive data to the inferential. Conclusions are drawn, tentatively of course, from the statistical fit between the financial and IFI, from the campus visits, and, to some degree, from bold speculation.

FINANCIAL ANALYSIS

A. Campus Finances

Total enrollments and the enrollments at most institutions rose rapidly during the early part of the 1970's and then leveled off. Institutional income (in constant dollars) rose more steadily during the 1970's and income per student was surprisingly stable—rising about ten percent with almost all of that change occurring before 1973-74. A significant point is that funds did not evaporate and the 1970's did not bring the financial disaster for higher education which many anticipated. One reason is that the federal government increased its share of institution funding.[2] The second reason that financial problems were postponed (and I emphasize postponed) was that institutions energetically scrambled for students. Our findings show that the percent of applicants accepted increased and the percent of accepted students enrolling declined. The campus visits reinforce this conclusion of institutional scrambling. On one campus after another administrators and faculty talk about their efforts to attract and hold students.

In spite of generally stable income, the campus budgets were, indeed, squeezed. As fuel costs, campus security, student aid, social security payments, and other largely uncontrollable items took a bigger bite out of the budget, balance was achieved by reducing faculty compensation (in real terms) and by delaying maintenance expenditures.

B. Changes in Campus Functioning

A comparison of the two sets of responses to the 132 IFI items shows a number of interesting trends. I will concentrate on only a few of the most significant scale score changes. This review, like the financial analysis, serves to buttress commonly held perceptions about the 1970's. For example, the single greatest measured change was an increase in meeting local needs. This is a clear manifestation of campus continuing education efforts. At the same time, the typical student body is more socially and economically, but less politically, diverse. On the other hand, according to these faculty reports, all constituents groups on campus show less interest and inclination in bettering society. There is also considerably less innovation at these colleges. And the campuses are governed in a more autocratic fashion than in 1970. During the same period and, not coincidentally, in my estimation, faculty morale fell. And, in general, the professors perceive that administrators are performing less satisfactorily.

One change is not so intuitive and deserves special attention because it speaks to the central mission of most of the colleges and universities in the sample and to most colleges and universities in the country. The Concern for Undergraduate Learning scale rose significantly during the 1970's. Faculty report growing attention to teaching for promotion and tenure decisions. Similarly, they report increasing interest in teaching and sensitivity to undergraduates by their colleagues. At the same time, another scale which gauges commitment to scholarship indicates that professorial attention in this area was unchanged. Although the respondents indicate that administrators and trustees show less interest in the scholarly activities on campus, the faculty report more publishing than ever. Professors, in my opinion, are responding to the weak academic labor market and striving to improve their position within it.

C. Finance and Faculty Perceptions

The overall picture is one in which institutions have maintained enrollments and income by scrambling for students. These colleges are reaching out to local residents and to less skilled students. In addition, these colleges are trying harder to serve these "new" students. Although faculty are paid less and are less satisfied, the evidence is that the institutions are as effective as ever. Faculty do not consider current administrators to be as qualified as their counterparts of a decade ago — a group which was generally able to increase the campus budgets every year. (I speculate that in a parallel fashion current administrators have less regard for the legislators and systems leaders of the 1980's than for their predecessors.)

When we attempted to statistically tie the changes in the IFI to changes in finance, we had very little success. The only link we could manage showed that concern for undergraduate learning rose as enrollment declined. This finding and the campus visits impress upon me the fact that, although the competitive market for students may not be a particularly comfortable one for those employed in the system, in many ways, it operates to the advantage of students. Put simply, because institutions need more students, they are serving students better.

IMPLICATIONS FOR ACADEMIC COLLECTIVE BARGAINING

There are, for example, some significant differences in results by institutional type. The purpose here, however, is to review the implications of the study for collective bargaining in the 1980's and 90's. To that end, I have tried to avoid a long detour into detail in the overview of the findings. During the discussion of the implications, I will call on some of the more complicated analyses as appropriate. There are two basic conclusions that I see for collective bargaining. The first concerns the primacy of the marketplace. The second considers the source of faculty satisfaction. Finally, I will mention briefly a special analysis which specifically considered the impact of collective bargaining on institutional functioning.

A. The Marketplaces

Colleges and universities are involved in a number of marketplaces. Two are especially important. Colleges purchase faculty and staff services in a labor market and they sell education and research in the learning and knowledge markets. One set of data we looked at in some detail was the trend in faculty salaries. Although this research can make no claim to be the definitive work on the academic labor market, the trends that we reviewed impressed upon us the ineluctable power of market forces.

Average faculty salaries (in constant 1980 dollars) as measured by the AAUP for the period 1968-1980 rose from $20,000 in 1960 to $27,000 in 1970. Seeking a longer perspective, we also studied non-farm wages from 1960 to 1982 (again in constant 1980 dollars). While non-farm wages rose slowly during the 1960's, faculty salaries rose about 35 percent. This was the period of rapid expansion in higher education when most institutions were adding staff and there was an inadequate supply of faculty. That situation changed dramatically after the early 1970's. The Ph.D. programs were at peak production and academic deans were struggling to maintain undergraduate enrollments. Most of these academic administrators possessed a keen awareness of the impending enrollment decline. As a consequence, many of these leaders were using part-time faculty whenever possible. In addition, the Ph.D. pipeline was spewing out new graduates looking for teaching jobs. The result is a decline in faculty salaries from $27,000 in 1970 to $22,500 in 1980. This decline almost matches the increases of the prior decade.

In order to obtain an even larger perspective, we studied salaries for faculty, physicians, dentists and attorneys from 1940-1982. In 1940, dentists and college faculty earned approximately $11,000. Attorneys and physicians earned salaries that were about 50 percent higher than college teachers. During World War II, this gap increased significantly, especially for dentists and physicians, as the demand for medical services grew and the number of college students declined. The end of World War II brought a temporary downward correction in the salary trend of physicians, dentists and attorneys. The influx of college students funded under the G.I. bill was undoubtedly part of the reason for the continued growth in professorial salaries at that time. Between the late forties and the early seventies, the average salaries of all these professionals rose. The increases in faculty pay did not match nearly those of the other three groups. This is a period in which we codified, legislated, and litigated every aspect of our lives. At the same time, we had the assurance that we could significantly extend these lives with appropriate social attention to medical matters. The 1970's show the salaries of professors and attorneys declining while medical practitioners show some signs of stabilization. The growth in output of these professional schools has caught up with demand. Although these professions are worried about a correction in the market, the fact remains that the median salary of physicians stands almost 300 percent above that of a college teachers. The salaries of dentists are approximately 175% over those of college faculty. The attorneys' median salary is twice as large. Of course, the faculty salary data are based on only nine months of income and do not include outside earnings. The actual gaps would be narrowed if total twelve-month renumeration of college faculty were reported.

The major point is that the trend in faculty salaries can be generally explained within the context of supply and demand information. This undoubtedly will hold true in the coming years and predictions about supply and demand can help refine our financial models and provide perspective for salary negotiations. I am not urging union negotiators to modify their stance because there is a weak market—although they will. The purpose here is to simply put the market in perspective and show how it has operated historically.

Are faculty underpaid? It depends upon the yardstick that you use. Certainly the decline in faculty pay relative to other professional groups is a worrisome trend. However, a recommendation to simply raise faculty salaries may not be in the best interests of higher education. Of the 5000 faculty responding to our survey in 1980, only three percent are actively looking for employment outside of academe. And, if the salaries of currently employed professors are raised without increasing the resource base, there will be fewer funds to hire new faculty. There is an important corollary to this analysis. A challenge facing those involved in the collective bargaining process will be to devise systems which can realistically accommodate faculty for whom competitive salaries are determined in non-academic labor markets—professors of law, engineering, business, and medicine.

The most important market for colleges and universities is the one in which they sell their services and the primary service they sell is the education of students. The demand for education as measured by enrollments has held up. That number is misleading. Enrollments have only been maintained by admitting less academically qualified students and by seeking new clientele, especially adult students. These changes are not necessarily undesirable. In fact, it can be argued they are socially beneficial. The changing responses of the faculty to the IFI already indicate that colleges and their faculty have become more responsive to the needs of students during the 1970's. This is a significant point for higher education and for collective bargaining. If the market for our services is going to remain weak—and it will simply because of demographics—colleges and their faculty will have to be more sensitive than ever to the needs of students. Collective bargaining agreements which unduly limit the ability of administrators or faculty to respond to student needs will be destructive to the colleges at which they are signed.

B. Sources of Faculty Satisfaction

The second major implication of this study of college environments has a certain quixotic ring to it but I offer it nonetheless. When we tried to explain faculty satisfaction using salary data, we found no statistically significant relationship. There was, however, a strong correlation between faculty satisfaction and democratic governance. That is, faculty were most satisfied at the campuses at which they perceived themselves to be involved in a meaningful way in academic decision making. This statistical connection was reinforced during the campus visits. As we traveled to the campuses and talked with faculty about their satisfactions and dissatisfactions, neither institutional nor personal finance were dominant issues. When faculty were satisfied, they talked about the quality of leadership and the effectiveness of their college. Not surprisingly, faculty were much more likely to praise an administration which listened to and involved the faculty. When faculty were dissatisfied, they faulted the administration for autocratic and bureaucratic decision making. I have been involved in research long enough to know that factors such as sample construction, sample size, and measurement error would prevent a prudent researcher from making a definitive statement. I am, however, opinionated enough to offer a provocative conjecture. Professorial morale is, in my opinion, influenced less by salary level than by 1) the effectiveness with which his or her college reaches students and improves their lives, and 2) the esteem with which the teaching profession is held by the public. Another challenge for collective bargaining is to make the process as positive an influence in campus affairs as possible. To some who view collective bargaining as a destructive process, this charge may seem naive. But, as I shall explain below, the best evidence is that collective bargaining has little impact on campus climate.

The major purpose of our research was to assess the impact of financial health on campus functioning. Two colleagues used this data base to assess the impact of collective bargaining on campus functioning. They identified 18 campuses at which collective bargaining agreements were signed after the first administration of the IFI, and before the second.[3] The faculty responses to the first IFI, therefore, could be used as benchmark measures of campus climate before the advent of collective bargaining. A matched sample of institutions which did not engage in bargaining was formed and by comparing changes in IFI responses for both groups of institutions the effect of collective bargaining could be gauged. As I prefaced above, there was no measured effect of collective bargaining. The authors conclude that 1) faculty may be less influenced by collective bargaining than administrators and 2) the measured effects of collective bargaining are lost when the larger environment of higher education is so turbulent. Another researcher, working with a different sample, has recently concluded that it is an "ineffective" environment that leads to unionism and that unionism has little subsequent impact on the environment.[4] If there is no natural and necessary deterioration of institutional effectiveness because of collective bargaining, there is, conceivably, opportunity for the process to have a positive influence.

SUMMARY

The financial problems of colleges and universities will continue into the 1980's and 90's. In the recent past, higher education has been able to buffer itself from declining demand by drawing from physical capital (deferred maintenance) and from human capital (reducing faculty salaries). In addition, admissions officers have been able to draw on a latent demand for higher education by adults and by students with lower academic skills. There are limits, however, to the extent to which these buffering mechanisms can protect colleges and universities. More worrisome, in my opinion, is the trend in public confidence in higher education. In spite of the apparent increased efforts to serve students, public support, as measured by Harris Polls, has eroded. Of course, public support in many social institutions has deteriorated but colleges cannot console themselves with this relativism. All of us in higher education, including those engaged in collective bargaining, should recognize the formidable market forces we will face. Moreover, the most satisfying environment for faculty is not determined entirely, perhaps not even significantly, by institutional financial well being. Faculty appear to be most satisfied when their organization was governed in an open and democratic manner and was effective in delivering educational services.

FOOTNOTES

1. In the succeeding two years, 1981 to 1983, federal student aid dropped over 20 percent. Most of that decline results from reductions in social security and veterans benefits.

2. Our data show that federal funds passing through the institution went up modestly (5 to 9 percent). Donald A. Gillespie and Nancy Carlson document that federal funds going to students increased at a far more rapid rate in *Trends in Student Aid: 1963 to 1983* (Washington, DC: The College Board), 1983.

3. Robert Birnbaum and Deborah Inman, "The Effects of Faculty Collective Bargaining on Campus Climate." Paper presented at the Annual Meeting of the Association for the Study of Higher Education, 1983. (To be published shortly in the *Journal of Higher Education.*)

4. Kim S. Cameron, "Investigating the Causal Association Between Unionism and Organizational Effectiveness." Paper presented at the Association for the Study of Higher Education, 1984, p. 23.

REFORMING THE SYSTEM

B. THE HUMAN ELEMENT IS THE BOTTOM LINE: THE CONFIDENCE FACTOR AND INSTITUTIONAL VITALITY

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INTRODUCTION

I have been involved for some time in research on effective approaches to college management. This work,[1] conducted at the National Center for Higher Education Management Systems (NCHEMS), was not directly concerned with faculty collective bargaining. The project studied the impacts of rapid decline in revenue on small colleges, what recovery strategies were adopted, and how recovery progressed.

Faculty bargaining figured in only three of the cases—though each in an interesting way—and the research project did not involve the development of detailed accounts of this aspect of organizational behavior. Nonetheless, the research yielded information and insights about institutional leadership and administration that should be useful in understanding the underlying causes of collective bargaining in the private sector of higher education. A bit of background about the establishment of collective bargaining in the private sector and the scope of the NCHEMS research will be useful at the outset.

Private colleges came under the jurisdiction of the National Labor Relations Board in 1970. By 1978, bargaining agents had been certified by 59 such institutions; 40 elections had resulted in no-agent decisions. In the public sector, only 53 four-year institutions had become unionized by 1978. And, of course, the totals are not much larger in either sector today.

The NCHEMS study covered 14 institutions, each of which had experienced a rapid decline in operating revenues in the early 1970s. Seven of the institutions had recovered in good stead; at the other seven, recovery was protracted and tenuous. The principal aim of the research was to determine what strategies promoted recovery best and what it took to make these strategies effective. All 14 cases propound, clearly and objectively, two precepts: First, a small college in deep trouble must find a leader with comprehensive talents and deep dedication. Second, the new leader must fully appreciate the value of the college's human assets and the lifegiving power of its intrinsic values. This paper argues that when college leadership has such endowments and evinces that orientation, the college will affirmatively respond to the concerns and needs that otherwise impel a faculty toward collective bargaining.

VARIABLES IN THE DECISION TO ENGAGE IN COLLECTIVE BARGAINING

There are studies enough that establish bad administration as the predominant factor in collective-bargaining decisions. Poor management and leadership lead to faculty alienation and a sense of powerlessness, and those feelings were easily aggravated by the wave of threatening change that swept through higher education in the seventies. The 1977 study by Mortimer and Richardson[2] of six public institutions presents representative findings. On four of these campuses, imperious, authoritarian administration was the principal reason why the faculty voted for collective bargaining. On another campus, rapid internal change was the motive. And on the sixth, change driven by external forces brought collective bargaining about.

The effects of poor administration and authoritarian leadership are nowhere more sharply felt by the faculty, both individually and collectively, than on a small private campus. Most of the 14 colleges in the NCHEMS study suffered from aloof, high-handed executive leadership and miserably bad management. And like most small private colleges in the seventies, they were severely shaken by a combination of hostile external developments. Primarily, their trouble was financial—a sharp decline in operating revenue caused by wholly unexpected drops in enrollment, at a time when service of accumulated long-term and short-term debt heavily drained the operating budget.

Typically, the college's troubles were caused more by inept and improvident administration than by unforseeable circumstances. And typically, the college president was paternalistic, made important decisions with little or no faculty participation, and was secretive about the worsening financial situation. Substantial numbers of faculty positions came under threat at most of these colleges in the early seventies, and many faculty were in fact dismissed. All in all, these colleges would seem to have been ripe for collective bargaining.

Admittedly, a powerful restraint existed on most of these troubled campuses in the private sector. In most instances, the very existence of the institution was threatened: closure, abrupt dismissal of faculty and staff, and sale of the campus to pay off debts was a real and present danger. The trustees, most of them conservative businessmen, might well have regarded a demand for collective bargaining as the last straw. At most of these campuses, also, another concern had to be the effect that such a move would have on the effort to recruit a new president. In almost every case, the presidency became vacant soon after the school was gripped by financial crisis.

In that equivocal atmosphere, collective bargaining became an issue at 5 of the 14 colleges. At 3 of these, an election was held and a bargaining agent was certified. At the other two schools, agitation for collective bargaining died out before an election was held. Let us look briefly, case by case, at the initial motivation for collective bargaining.

(Each case in the study was given a pseudonym, and I will refer to them hereafter.)

At Prophet College, the administration was imperious to a degree that fairly could be called incredible. It also was rash beyond measure with respect to growth policies and program planning. When the inevitable crisis came, the administration began trimming the budget with an axe. In all, half the faculty was fired—including nearly every member who had advocated collective bargaining.

At Faith College, the faculty long had been unhappy because of low salaries. It began to seriously consider collective bargaining after two straight years without any salary increase. Under the threat of faculty unionization, the administration provided nominal raises and the issue subsided.

At Link College, the faculty endured six years of an administration that could not make up its mind whether to sell the institution or merge. In anticipation of merger, the faculty was suddenly increased by 25 percent, only to be cut back when the merger did not materialize. Year after year, faculty salary increases were niggardly, because the administration projected a sizable budget deficit. In fact, the deficits usually were small, and in the year when faculty were persuaded to take no increase at all, a surplus was posted. Perennially underpaid and unsure about the future of the college, the faculty voted to make the AAUP its collective bargaining agent and called for a new president. The trustees responded admirably, bringing in a highly qualified educator with marked administrative talents, skill in community relations and student recruiting, and an open, communicative style. The faculty union has not been combative, and in fact devoted its strongest efforts to developing lines of communication between the faculty and administration. Faculty participation in decision making has been improving. In short, the faculty voted for collective bargaining as a last resort, and as soon as an administration in which the faculty could have confidence was installed, collective bargaining became nonconfrontive. The steady progress of the college toward full institutional health has been marked by faculty-administration cooperation on a broad front.

At Case College, growth in the seventies brought about a three-fold increase in the size of the faculty and a steady expansion of facilities. Construction was still in full swing when enrollment suddenly dropped off and a downward trend was established that would see enrollment decrease 27 percent in five years. After the second year of decline, the president fired 25 members of the faculty, choosing those to be let go without any consultation. The faculty immediately voted for collective bargaining, and internal dissension became a serious organizational problem. The president continued in office for five more years, during which faculty suffered further heavy cuts and a protracted salary freeze. The next president proved unable to deal with major administrative problems of the college or to raise money, and bowed out after two years. His successor stabilized the financial situation. But the student body and faculty are only half as large as they were in 1970, and the college labors under heavy burdens of capital and short-term debt. Nonetheless, the new president, whose style is participative and collegial and who is a good financial manager and effective fund raiser, has won the full confidence of the faculty. Two years ago, in fact, the faculty voted to decertify its union.

Quest College, the third school in the NCHEMS Study where collective bargaining was established, is anomalous in important respects. The college began the sixties with fewer than 200 students; by 1972, enrollment had grown to 1,900. In 1973 or 1974—no one at Quest today remembers exactly when, and no records can be found—the faculty voted for collective bargaining. Since the president at the time was collegial to the point of allowing the college to be run by committees and was highly responsive to faculty wishes, the motive for unionization is obscure. For its part, the faculty serves without tenure or rank, traditionally has accepted low salaries, and frequently has taken salary cuts to help the college fend off financial disaster. Trouble overtook Quest College soon after unionization, beginning with a downturn in enrollment in 1975. Periodic faculty and staff reductions were made as enrollment declined through the seventies. Finally, in 1981, Quest sold four of its five academic programs to a nearby college, which enrolled the students and also hired the faculty for those programs. Quest was left with barely more than 100 students and a faculty of only eight full-time members. Collective bargaining is still a formal requirement, but no one on the faculty is a member of the union. Whatever the impulse for collective bargaining at Quest, it seems never to have functioned in a customary way or to have played a substantive role in the tumultuous decline that ended with what amounted to voluntary decimation. Shifting program demand and too-rapid expansion were the primary causes of decline at Quest, rather than markedly poor administration or hostility between the administration and faculty.

IMPACT OF COLLECTIVE BARGAINING

Mortimer and Richardson found that in some of the public institutions they studied, collective bargaining did not reduce tension between the faculty and administration. In these cases, communication became formal and documented. Administrators continued to be or became authoritarian and tried to retain control over faculty rewards. Confidence waned on both sides, and both the union and the administration became internally divided regarding the issues in dispute.

But at some schools, Mortimer and Richardson found that collective bargaining led to accommodation. Consultation and free exchange of information replaced confrontation, and appeals to enlightened self-interest gained a hearing. Cooperative decision-making developed and internal cohesion marked both the faculty union and the administration. Joel Douglas[3] suggested recently that nationwide, faculty-administration relations in collective-bargaining settings are becoming less frequently confrontive, indicating that accommodation is on the rise.

The failure of collective bargaining to become the predominant mechanism for faculty-administration relations in higher education, despite the steady erosion of faculty rewards over the past decade, is not quickly or simply explained. But the Mortimer-Richardson study and the NCHEMS study both argue for the proposition that faculty collective bargaining is not generally regarded in higher education as a desirable and effective organizational strategy. It comes about because of dissatisfaction among the professional cadre, which has the heaviest responsibility for making educational efforts effective. Traditionally, teaching is the least concerned of all lay professions with material rewards, and so faculty dissatisfaction is not a matter of avarice. The desire of the faculty to participate in institutional decision-making is nearly always satisfied by processes that in no way reduce administrators to puppets or aggrandize power for its own sake. In both the private and public sectors, broad consensus exists in favor of harmony based on mutual respect, collegiality, and joint faculty-administration dedication to mission and goals of the institution. In the NCHEMS study, we found little evidence that faculties in small private institutions regarded collective bargaining as other than an absolute last resort. On the few campuses where collective bargaining was embraced, the faculty employed it more to reduce than to maintain tensions and shelved or abandoned it as quickly as the administrative picture improved. The terms of accommodation identified in the Mortimer-Richardson study are indications of progress toward the kind of faculty-administration relationship that utlimately makes collective bargaining a pro forma exercise.

Equally clear is the fact that in situations where collective bargaining becomes an issue or a reality, the need for change resides mainly in the administration. Faculty dissatisfaction usually is closely aligned with major institutional difficulties and deficiencies that impinge directly on effectiveness. The power and resources to effect productive change rest with the president's leadership. However participative, all major decisions must bear the president's signature. Organizational effectiveness depends upon top-level decisions about allocation of resources. And more important than observers from the business world might imagine, administrative tone and style are major determinants of success in most efforts to improve organizational effectiveness. Tone and style can only be controlled from the top.

PRESIDENTIAL LEADERSHIP

The NCHEMS study affords a powerful lesson: a private college may survive poor leadership, but it cannot rise above it. It is a generalization I am tempted to apply to all of higher education, not only because it jibes with my general impressions but because it makes such good sense. Whichever aspect of organizational effectiveness one may study, quality of leadership is likely to emerge as a critical factor. And study of management in higher education inevitably leads to the realization that a good manager is not thereby a good institutional leader. Good management is of course indispensable, particularly when an institution is forced into retrenchment to stem the flow of red ink. But few administrative positions involve only managerial skills, and management is but one of a demanding set of abilities the successful chief executive will require.

The successful college president also will require a sound strategy for recovering or maintaining institutional health. The ability of a college to adapt to its environment and market is a necessary but not sufficient condition for recovery. All the colleges we studied made adaptive changes in response to new environmental conditions—changes in program offerings, modifications of program content, and changes in institutional policies. Administrators and faculty both thought specifically and carefully about the institution's markets and its relationship to those markets. At the more successful schools, informal communication networks arose: individuals could look, listen, and compare notes with others about signals from the environment and what they meant for the college. In the small, relatively homogenous institutions, adapting did not require elaborate management-information tools or systems. It did not require a willingness to become aware of and respond to what was happening in the world around the college.

But a willingness to adapt is essentially a reactive strategy. To fully capitalize on institutional strengths and opportunities, the president should institute an interpretive strategy, which involves something that may be termed the confidence factor. Relative skill in employing interpretive strategy was the critical difference between the schools that recovered fairly quickly and fully and those that did not. Moreover, success with interpretive strategy largely depended on superior leadership. To the extent that the stories of the colleges in the NCHEMS study are the stories of their presidents, the concept of interpretive strategy explains why. Unfortunately, the concept eludes concise definition.

Interpretive strategy is grounded in the social-contract view of organizations. Implicit in this theory, of course, is the need for organizational goals to be broadly compatible with the goals of constituents—a notion that may be truistic, but in application is anything but simplistic. Given a viable mission, interpretive strategy focuses on the objectives of the various individuals and interest groups that choose to associate with the college. The assumption is that the organization will prosper as long as sufficient numbers and types of constituents participate and contribute in various ways to help generate the benefits they value. That is where the confidence factor becomes crucial. Constituents must have confidence that a college will pay off as expected, in all of the diverse ways necessary to satisfy the multiplicity of constituent objectives. Parents, faculty, students, staff, donors, townspeople, legislators, potential students, and others have both role-related and personal priorities vis-a-vis the college. The variety of expectations means that virtually every aspect of the college must inspire confidence.

Briefly put, interpretive strategy represents what the leader must do to restore confidence in a college. The president is not only the dominant figure when key decisions are made and important things are done, but also the personal embodiment of the organization. The language conveying the organization's identity and hopes comes from the president. In the NCHEMS study, presidents who effectively used interpretive strategy showed great personal sincerity and dedication. They told the truth and they had strong communication skills. Their tone was one of sensible optimism. They were committed to a few immutable cornerstones, such as the integrity of the organization's purposes and the worth of the people of the college. They communicated their commitment and confidence to those who could provide the resources necessary to maintain institutional integrity and protect the people of the college.

If the college made major efforts to adapt to its changing environment, the president structured and explained such changes as extensions of familiar activities and values. Thus when expenditures had to be cut, the president made it clear that minimizing human costs was a central factor in the inevitably painful decisions. But situations threatening to the credibility of the organization were not tolerated, on the ground of human concern or any other.

Effective presidents also surrounded themselves with the most able administrators they could find. For example, several colleges had employed vice-presidents for business and finance who were incompetent. Effective new presidents quickly replaced them, knowing that the change would not only help rationalize the financial situation but also would enable the college to present itself truthfully to potential donors as reliable and efficient. By putting their houses in order, these presidents gained solid ground for stimulating support from dormant external constituents. They were able to show prospective students and donors that each could have confidence in the ability of the college to provide high-quality programs, to produce a high yield of value for each dollar invested, and to meet other individual goals.

Within the college, interpretive strategy requires that administrative performance and guidance be clear, direct, consistent, and authoritative, but with no authoritarian overtones. In establishing limits and goals, in setting forth criteria for judging progress, in defining organizational identity, the administration neither dictates to the faculty nor gives the faculty carte blanche. The decision process is marked by a high degree of communication and openness between the administration and the faculty. Faculty commitment to the administration's statement of institutional goals and operational policies arises from this involvement in organizational processes. It reflects also faculty appreciation of freedom to nurture their professional interests and obey their consciences.

The confidence factor gives tensile strength to all the invisible ties between the ideas and values that the college embodies and its constituents. Beyond that, confidence has the odd power to perpetuate not only itself but its visible object—the community of scholars and students and benefactors and external beneficiaries who are the important substance of the college. Having confidence in the values of a college motivates people to maintain and enhance those values. Wide confidence in the values of a college furnishes the basis for just evaluation of performance, starting with the president.

SUMMARY

Interpretive strategy, by aiming to create and maintain confidence both within and outside the college community and by declaring the fundamental importance of institutional values, provides strong protection from the danger of over-adapting and destroying institutional identity. One can generalize that recovery from organizational decline is largely a business of instituting or reestablishing a rational basis for organizational activity. But organizational rationality, like logic itself, must proceed from sound precepts. In the world of small private colleges, we found, an effective leader is one who fully perceives the interdependence of values and effectiveness—and who is constantly guided by this knowledge.

The value of higher education is no longer self-evident. The potential students emerging from the elementary/secondary system described in A Nation at Risk are ill-equipped to recognize the advantages of a college or university education. The upturn in the economy, if it lasts, and the increasingly sophisticated requirements of the post-industrial economy for professional skills and intelligence suggest that more and more of our most able faculty members will be tempted to leave the campus for other careers. The funders of higher education have many worthy demands on the resources, public and private, they disburse. Confidence in higher education and its institutions in the long run dictates the extent and quality of participation in all its aspects.

I have in this paper made confidence a function of able and dedicated leadership, energetically pursuing an interpretive strategy. I have said that this formula establishes a basis for fair evaluation of both leadership and institutional performance. I have pointed to objective evidence that the formula can be applied to rescue colleges from dire circumstances. There is, however, a sobering consideration to be kept in mind. Interpretive strategy is all but useless if an institution does not have defensible and recognizably positive, relevant values. It will do no good for an institution unwilling to meet the needs of its constituents. It will not secure the future for an institution whose members are unwilling to make exhausting efforts and painful sacrifices. Interpretive strategy is, in short, an unsparing instrument of self-evaluation, more demanding than any collective-bargaining demands that a faculty union might plausibly put forward in an American college or university today. Therein lies its intrinsic worth.

FOOTNOTES

1. See Ellen Earle Chaffee, with David A. Whetten and Kim S. Cameron, Case Studies in College Strategy (Boulder, Colo.: National Center for Higher Education Management Systems, 1983).

2. Kenneth P. Mortimer and Richard C. Richardson, Jr., Governance in Institutions with Faculty Unions: Six Case Studies (University Park, Penn.: Center for the Study of Higher Education, Pennyslvania State University, 1977).

3. Beverly T. Watkins, "State Laws, Ruling in Yeshiva Case Blamed for Slowing the Pace of Faculty Unionization," The Chronicle of Higher Eduation, 5 May 1982, p. 6.

IV. STRUCTURAL REFORM

A. RESHAPING THE FRINGE PACKAGE
B. IS TENURE AN OBSTACLE TO REFORM?
C. CONCESSION BARGAINING
D. MERIT PAY

A. 1. RESHAPING THE FRINGE PACKAGE: THE PROBLEM

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INTRODUCTION

How does a negotiating team put together a fringe benefits package? The answer is: with great difficulty. Gone are the days when a union could sit down with an employer and work out a salary settlement, and then designate a modest 2 or 3% improvement in the fringe package. The total share of settlements for welfare and fringes has been soaring over the past decade, so that today, depending on the average negotiated salary, these costs can go as high as 20% of any settlement; and therefore must be treated as a significant segment of any agreement, a figure which has, in fact, reduced the salary increases gained for the employee across the table.

COST ESCALATION

This extraordinary increase in costs is due, of course, to the corresponding increases in insurance costs, which reflect mounting medical costs. Since 1967 hospital costs have increased a staggering 457 percent, 2 1/2 times the rate of inflation. In a normal situation, hospital use would decline in the face of increases like this, but this hasn't proved to be the case. For a variety of reasons, doctors are using hospitals more today, and, over the past twenty years, there has been a 74% increase in practicing physicians in this country. All this means is that more doctors are sending more patients to more hospitals, which on any given day are 25% empty.

What's feeding this escalation? Certainly a part is increased physician's costs. Because of the growing sophistication of testing equipment, doctors are using hospital testing facilities. In some ways, doctors must do this to protect themselves. The growing number of malpractice suits almost mandates that a doctor cover himself by ordering every possible test, however remote so that he can defend himself later in court. This is particularly appealing to a doctor if he knows the patient has either private insurance or Medicare coverage which will defray the expense.

Perhaps the most obvious escalator is the patient expectation which has developed in this country. Everyone wants the best medical care. This was not always the case. Years ago people generally accepted the medical care offered in a local community, but now people travel thousands of miles for specialists and treatment. Everyone expects his physician to have state-of-the-art equipment in his office, and every hospital must have one of everything, however under utilized. A patient just can't understand why a doctor would associate with a hospital which doesn't have a CAT (computer assisted tomography) scanner, even though a hospital ten miles away has one which could be shared. People expect the latest technology at the facility they use, and all arguments about excessive costs, underutilization, and cost overruns fall on deaf ears (no pun intended). Back to the bargaining table. What does the negotiating team do when the membership wants 100% health coverage, life insurance, a tax deferred annuity, a better dental plan, hearing aids, disability payments, and glasses for everyone in the family? The quick answer is to find benefits which are so-called "no cost" items and bring in a package of these. The employer loves this, and the employees' share of the salary packages isn't diminished beyond hope by expensive medical products.

An excellent example of the no-cost benefit is the 403b(7) tax deferred annuity program, designed for educational and hospital employees. It allows an employee, through salary deduction, to have his gross income reduced by upward to 25% for tax purposes. Of course, when the money is withdrawn, taxes must be paid, but in the meantime, it is a wonderful tax shelter.

In New York City employees in the Teacher's Retirement System enjoy a TDA managed by the system itself. The same is true of TIAA members. They have an SRA, which is a 403b(7) TDA. But there are complaints among our members about fund returns, investment strategies, etc. Most of the complaints are misguided. Members are really pleading for the right to manage their own funds in their pension system, which can't be done under existing law. The interesting aspect of this is the growing number of members in non-contributing plans who want to control the employer's contribution on the assumption that they are capable of more sagacious investments. But a union can negotiate a new TDA, and, by making an arrangement with Keystone, or Vanguard, or Value-line, or some other company can offer a money market type of product to its members, which provides a handsome tax shelter with a better return than most annuity plans.

Benefits which increase the employers' costs have to be examined carefully. A few years ago, a major labor leader in this area was decrying the dental plan his own union had established, for each time he won an increase in benefits, local dentists gleefully raised their prices, so that members paid the same deductible, the union paid more, and care remained essentially the same.

This is the dilemma facing all unions, playing catch-up with an out-of-control medical cost escalation. Two years ago, the PSC, as part of the Citywide bargaining coalition, won an increase of benefit rates from a 1973 schedule to a 1980 schedule for basic GHI coverage, a handsome increase. At the same time, the union funded welfare program, which supplemented the city plan, was forced, because of extraordinary increases in insurance costs, to reduce benefits. The net result is that members have less real benefits now than they had in 1980, and the cost has increased.

Is it wise for a union to press for more money for less and less benefits? That's a no-win situation for a union leadership, as well as for those whom they represent. Most of the little goodies talked about today do not improve benefits so much as they reduce cost and supply inferior benefits. Certainly this is true under the Reagan Administration's Medicare revisions, and everyone admits that something drastic must be done in this area, or the fund will be running at a deficit by 1990.

THE "MENU"

A much discussed alternative to fixed benefit plans is the "menu" approach where the employee is offered a list and he or she can select benefits from the list up to a given amount. But even the "menu" approach has its drawbacks. Certainly no one can argue with an employee who doesn't want children and doesn't want maternity benefits and should be allowed to select something else on the menu. But given the stretched medical dollar, very often the employee will have to make hard choices, for instance, between extended hospital benefits or a psychiatric rider. A wrong choice could spell financial disaster for the employee. Certainly these are real reductions of benefits if the employee enjoyed a comprehensive plan prior to his introduction to the "menu" plan.

CONTRIBUTORY PLANS

More common is the employer insisting the employee accept a contributory plan. New York State has a 10% contribution by employees which goes up as the insurance premium increase. This is a reduction of benefits and is subject to constant renegotiations. The figure can go to 15%, 20% or 25% as those at the bargaining table are faced with a determined employer.

There must be a better way. That's not to say that unions stop playing catch-up. They can't stop, or the members' benefits will drop at a rate of 12 to 14% a year, the approximate increase in medical costs. But it seems to me that the unions should devote energies to stopping this spiral.

Talking about socialized medicine is [illegible] no-no in this society, but the American people clearly want containment of hospital and physician cost. In fact, according to an AARP study published three months ago, a whopping 81% of the American public said enough is enough. And, in fact it is enough. Shortly, by next year or the year after, the American public will be spending more on health care than on food. What the public hasn't come to grips with is that, if the government caps cost, as it did with hospital costs for Medicare, then in effect, we will have government established fees for doctors, as well as hospitals, and that is what in some circles, is quaintly called socialized medicine. Last January, John Sweeney, President of SEIU called for other unions to join him in a proposal to control doctor, hospital, and insurance company costs.

Short of this, labor and management can agree to Health Maintenance Organization programs, commonly called HMO. In higher education, at least at City University, the HMO program has not been popular; yet for many reasons the HMO concept should be encouraged. The common relationship between physicians and patients is one of stress. The ill patient goes to see the doctor. The doctor reacts with massive diagnostic testing, including hospitalization, and consultation. The doctor's income, a-fee-for-service, is based on these stressful events, and certainly the patient is in no position to question either the procedure or costs.

An HMO is based on a pre-set fee. It pays to keep the patient well. More time can be spent on prevention. An anecdotal record is created which develops a comprehensive history when a person isn't ill. In short, the doctor is being paid to keep people well, not to get them well.

In the New York City area, both the HIP and the Med Plan are examples of HMO's which offer comprehensive service at reasonable costs to the employer. Certainly some time and effort should be spent on a study to determine why certain employees avoid HMO's while others embrace them.

SUMMARY

There is an economic reality to all of this which must be faced. Employers are not willing to pay these increased medical costs in the form of higher insurance premiums, and, at the same time, give adequate salary settlements.

The recent flap in the New York Times about welfare costs for Chrysler workers adding $600.00 per car cost, strongly suggest that these workers should accept less, that adequate benefits are no longer what automotive workers, or for that matter workers in any field, should expect.

Given this, union founded health maintenance organizations seems to be the only reasonable answer. For smaller unions, some sort of cooperative plan would have to be developed. Certainly, if adequate medical care is one of the aims of collective bargaining, this seems to be the one solution which could meet needs in the near future. Long term, unions should join with other groups to obtain legislation to cap medical costs in this country. This is a long fight, but one worthy of the American labor movement.

A. 2. RESHAPING THE FRINGE PACKAGE: CAFETERIA PLANS

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INTRODUCTION

Reshaping the fringe package in collective bargaining agreements in higher education represents a challenging and somewhat new frontier for negotiators. Challenging, because it is a new area fraught with sink holes. To the unwary negotiator cafeteria plans may be attractive on the surface, but underneath, full of holes.

Cafeteria, or flexible benefit plans, are attractive because they allow participants to pick and choose from a variety of options. Those options may deal with financial security, health, service connected needs, non-service connected needs, professional growth and recreation.

Probably the greatest single impetus to the movement to cafeteria plans is the growth of families with both spouses employed. This creates a situation where many fringe benefits are duplicated within the family unit. There is little addition to an individual's compensation (salary and fringe benefits) when both marriage partners receive the same benefits. Since fringes usually extend not only to the employee but also to his/her dependents, this compounds the duplication and reduces the value of the fringes to each spouse. Cafeteria plans would allow an employee to select all or partial fringes in one area and thus, through the money saved by the employer, select all or partial benefits in another area.

The ability to select is not only attractive to marriage partners who work, but to the rest of the work force as well. For example, younger employees prefer short term benefits and higher salaries whereas older employees prefer high cost medical and retirement benefits.

Employers look at cafeteria plans as a way to save money and to enhance the morale of their employees. It also makes it possible to pass on costs of future benefit increases to the employee as the employee becomes used to a variety of benefits and thus has a strong desire to continue those benefits.

Let's take a closer look at the pros and cons of cafeteria plans to both the employee and the employer.

For the employee, the variety of benefits under a cafeteria plan is incalculable. The determination of what to include is only limited by the imagination. In higher education, the options may extend from greater or lesser financial security to greater or lesser opportunities for professional growth. For example, private employees in the private sector that have cafeteria plans may select a day off with pay, birthday off with pay, freedom to schedule weekly leaves, extended lunches, extended vacations, additional life insurance, prepaid legal service, discounts on company products, stock purchases, business membership, tax assistance, interest-free loans, matching charitable contributions, day care facilities, resort facilities, employer contributions to savings fund, free checking account, etc. All of the above are in addition to the basic benefits options such as health, disability, dental, optical, prescription and life insurance.

In higher education, some, but certainly not all of the above would be practical depending on whether or not you were a 10-month or 12-month employee. Extended sick leave days, personal days, professional days, sabbaticals, promotion, exchange programs, in-service programs, reduced work year and prepaid professional memberships, in addition to a mix of health and financial security options, would be feasible. Finally, the individual may select all or none of the above benefits and opt for higher salary.

TYPES OF PLANS

A. Core Plan

There are roughly three cafeteria plan designs that can meet the needs of employees and at the same time protect the employee from catastropic occurrences.

The first is the Core Plan. This design insures that all employees have identical minimum levels of protection against the possibility of serious health problems and family protection against the loss of the bread winner. This protection would include life insurance, short-term disability income plan, a one-week vacation for 12-month employees and a minimum level of hospital and medical coverage for the employee only. Once the core is established, the employee may improve upon the existing core or select other benefits from a list of options. For example, the individual may opt for additional life insurance, long-term disability, dental, optical, medical benefits for dependents, additional vacation or any of the other options mentioned above. The advantage of selecting a particular option would be dependent upon the life style, age and/or sex of the employee. An employee who is already receiving dental coverage because of his/her spouse could drop dental and select longer vacations, more holidays or in-service professional training.

B. Option Plan

The second plan gives the individual a number of options. The present benefits that you enjoy remain the same. However, in this plan you may decide to decrease your core benefits, increase your core benefits, move in and out of the core benefits and add or decrease your secondary options as your needs change. For example, you may decide to increase your deductible for major medical and use the savings to increase your life insurance or vice versa. Also, you may decide to drop the dental plan as your children grow out of the cavity stage or you may decide to increase your dental coverage because of peridontal problems. Or, you made decide to decrease your life insurance because your spouse works and add the savings to your pension benefits. The important principle of this plan is that the individual retains a minimum benefit level below which he/she cannot move. This is to insure that the individual does not lose necessary protection in the area of health and financial security.

C. Package Plan

The third option is similar to the second but the individual increases benefits only. Also the employee may choose only one package from a variety that the employer has developed. Your choice is dependent upon your life style: divorced, single parent, single, working spouse, etc. The distinct advantage of this plan is its administration and communication. There are preset options that the employee chooses. The employee may not mix any of those options. Once chosen, the option must be continued until a certain date. The costs of this plan can be determined rather easily. It is also easier to communicate the plan's advantages to the employee.

The major advantages to the college administration and to the professional staff are cost containment and better employee relations. Cost containment is reflected in the options that employees have which may result in the employee paying for his/her options. The more the employee deviates from the existing core benefits, the more the employee may have to pay to enjoy the additional benefits. Better employee relations are reflected in the options an employee has, depending upon his/her life style.

TAXING FRINGE BENEFITS

There are a number of disadvantages that can impact on both the administration and the professional staff. A major disadvantage is the chilling effect that the IRS has on employees who are not sure if a particular fringe is taxable. For example, life insurance above fifty thousand dollars is taxable. Hospital and major medical insurance is not taxable, but day care facilities are. Interest-free loans are non-taxable, but employer contributions to savings funds are, etc. The IRS has been very aggressive in pursuing fringe benefits as taxable items. There is absolutely no way of guaranteeing that today's non-taxable fringe benefit wil not be taxable tomorrow.

Over the years a number of laws have been passed in an attempt to clarify this issue starting with the Employee Retirement Income Security Act (ERISA) of 1974. Here, Congress said that fringe benefits would be taxable if the employee could have elected to take taxable benefits such as an increased salary. This was supposedly an improvement over the previous practice of taxing fringe benefits only if they were in fact taxable.

Then Congress passed the Revenue Act of 1978. This Act said that the fringe benefit was taxable only if the benefit chosen by the employee is in fact taxable.

In 1979, the Technical Corrections Act attempted to define more clearly the eligibility of employees to select benefits.

In 1980, the Miscellaneous Tax Act allowed employees to select cash benefits or deferred benefits without the danger of being taxed on all of the options.

The latest conundrum is the February 10th ruling dealing with flexible spending accounts. This places the whole issue in jeopardy again. In addition, there is a conflict between the Senate and the House on taxing fringe benefits in the future. The Senate Finance Committee proposes extending the tax-free status of fringe benefits for college employees until after December 31, 1985. This measure safeguards tax-free benefits that legally ended December 31, 1983. However, the House Ways and Means Committee would allow the IRS to issue regulations that tax some fringe benefits, such as subsidies for faculty housing and employer-financial tuition programs but not tuition-remission programs. The House bill would also allow for IRS regulations to be established for interest-free loans.

Without going into further detail it can be said with certainty that the issue of taxable fringe benefits is still uncertain.

COST CONTAINMENT

Another major disadvantage is the possibility that the program may cost more rather than less. Most public employees in New Jersey county colleges have a wide array of fringes including health insurance for both the employee and dependents, life insurance, disability, unemployment, dental, prescription, optical, sick leave, personal leave, bereavement leave, professional leaves, sabbatical leaves, etc. All or most of these benefits are paid by the employer, either the State of New Jersey or the college. Any additional benefits may be too costly for the employer.

If collective bargaining agents for college professional staff were to successfully negotiate cafeteria plans they may find that the employees may have to pay for some of the already existing benefits in order to negotiate additional benefits.

Not only is there the possibility of cafeteria plans being more costly than the present benefits enjoyed by employees, but the administrative costs of the plan may dissuade an employer. The more options that employees have, the more complex the administering of the plan becomes. Employees must recertify their options periodically. How frequently this can be done depends on company policy or can be negotiated. This recertification will increase paper work and ultimate costs.

LEGAL IMPLICATIONS

Finally, there are legal implications to the employer and/or the association/union taking an active part in advising employees as to what options he/she should take. In those institutions where there are no collective bargaining agents, the employer may be incurring liability if he initiates counseling. Although I know of no case law on this subject, common law does establish employer responsibilities to its employees. The association/union responsibility is unclear, but an employee who sues the employer for bad advice may make the association/union a co-defendant or at the very least, file an unfair labor practice charge against the association/union for failure to represent adequately.

Because my time is limited I have not gone into any detail as to the cafeteria plans available nor the advantages and/or disadvantages of the options. I would strenuously advise that both administrators and associations/unions look closely at the plans before offering them to employee/members. The advantages will be very appealing to certain employees/members. However, the disadvantages may far outweigh the advantages causing problems not only for the employer, but the association/union as well.

B. 1. WHETHER TENURE IS AN OBSTACLE TO REFORM

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INTRODUCTION

During the first third of the 20th Century, a professor could be terminated for a good reason, a bad reason, or for no reason at all unless he had tenure. In the 1930's, this country embarked on a course of expansive civil rights legislation. The resulting litigation explosion has increased faculty rights and is whittling away at managerial prerogatives embodied in the doctrine of employment-at-will. Now, in the last third of this century, a faculty member, whether tenured or not, may be statutorily protected from discharge by reason of union activities, sex, race, religion, national origin, and age. In the public sector, faculty also enjoy the First Amendment protection of free speech. Through private agreement or collective bargaining, contractual rights are increasingly diminishing managerial prerogatives and concomitantly increasing faculty rights against arbitrary employment decisions. Perhaps, we should ask whether these developments are an obstacle to reform, but our task today is to focus on tenure. What is tenure? At the very least, it is contractual protection from discharge without just cause. Is it an obstacle to reforming higher education? Of course, it is. Should it be abolished? Not necessarily.

Three years ago I addressed this conference on the subject of judicial protection of academic freedom in higher education. I said then that courts don't grant tenure, that they don't substitute their judgment of a teacher's competence for the judgment of educators. That is no longer universally true.

JUDICIAL INTERVENTION IN THE TENURE PROCESS

Despite the fact that the well-established position of the judiciary is to refrain from disturbing tenure decisions,[1] 1983 was a year in which the remedy of tenure was ordered. Last June a federal district court in Alabama ordered the University of Alabama to grant tenure to Dr. Margaret Rose Gladney.[2] Dr. Gladney had fulfilled the level of competence required in teaching and service but failed to meet the research requirement to achieve tenure. As a result, the Vice-President of Academic Affairs extended her contract and gave her an additional year to meet the research requirement for tenure. His letter to her stated:

> . . . in consideration of the short period of time from now until the review for tenure starts next fall, you may wish to secure outside review of materials that you intend to submit for publication but, because of shortness of time, you do not expect to be published before tenure consideraton begins.[3]

When she was reviewed for tenure the second time, she produced two articles which had been accepted for publication and submitted the opinions of scholars in her area of expertise, American Studies, that her work exhibited quality scholarship. At the program level, the vote was three to two in favor of tenure; the no votes were cast by people outside her department. The dean voted against tenure, and the academic vice-president denied tenure and terminated her employment effective May 15, 1983.

The court treated her one-year extension letter as a contract and found it had been breached. The court reviewed favorable evidence from outside scholars and members of her department and the court looked at her articles. The court found the articles well-written and well-researched and the subject matter a legitimate academic pursuit "of sufficient quality to fulfill the requirements for tenure."[4] The decision was not appealed.

The Gladney court did not have to make an objective determination, such as whether there were enough publications to satisfy the research requirement. Instead, it had to decide whether Dr. Gladney proved by a preponderance of the evidence that her articles were of sufficient quality to satisfy the contractual publication prerequisite for tenure.

More importantly, the court did not order the university to give Dr. Gladney another opportunity for review. It did not find that she had already achieved de facto tenure or tenure by default. Unequivocally, the court rejected the judgment of administrators and people outside her department and upheld the judgment of her department members and scholars in her area of expertise, and granted her tenure.

In February of this year, the Court of Appeals for the Seventh Circuit stated that "(w)hen presented with an appropriate case, we may be required to ('replace the university's judgment about academic employment with judgments made by the judiciary')."[5] Last year the federal district court in Massachusetts held that Professor Kumar was unlawfully denied tenure at the University of Massachusetts on the basis of national origin. The court appeared ready to grant tenure as a Title VII remedy, but at trial Kumar withdrew his request for reinstatement as a tenured professor.[6]

Not only may some courts be relaxing their traditional restraint over academic employment decisions, but the parties to some academic contracts have agreed to submit tenure disputes to arbitration. Last year the Supreme Court of Hawaii upheld the authority of an arbitrator to grant tenure and promotion.[7] One basis for the decision was an express clause in the collective bargaining agreement permitting the arbitrator to "substitute his judgment for that of the official" if the official's decision was arbitrary or capricious. A separate basis for the decision was quasi-estoppel: the university should not be permitted to take inconsistent positions if the result is to harm another. In other words, the university should not be permitted to invoke the contract by submitting the issue to arbitration and then reject the arbitrator's contractual authority to substitute his own judgment. A third basis for the decision was the public policy of encouraging arbitration. Because the arbitrator had not made an express finding that the decisions of the president and chancellor were arbitrary or capricious, the court directed the arbitrator to rehear the matter and to substitute his judgment and award tenure if he found the decisions to be arbitrary or capricious.

Through private agreement, the academic community is increasingly developing tenure criteria and systemically applying those criteria to tenure applicants. These criteria are sometimes found in faculty handbooks or develop as a common law of the academic community.[8] Whether expressed or implied, these criteria and the procedures for applying them to tenure candidates may be enforced as contracts as courts continue to erode the doctrine of employment-at-will.[9] The role of the courts is simply to enforce the agreement. The more difficult task for academia is to decide what the agreement will be.

The traditional legal relationship in higher education reserves to management the unfettered discretion to hire, retain, promote, tenure and discharge faculty, absent unlawful discrimination. Traditionally, faculty are not entitled to justifications for these decisions. Management must prove just cause only when discharging a tenured professor or a non-tenured professor in mid-contract. While we are deciding how to reform higher education, we should determine whether we must also reform that traditional legal relationship to assist in strengthening the institution. Our starting point is to recognize that there are apparently competing interests at stake.

CONFLICTING INTERESTS IN THE TENURE SYSTEM

Management's interest is in maintaining flexibility so that changing educational needs can be met. To the extent that tenured faculty cannot meet those needs, they must be re-educated or replaced. Management cannot effectively achieve reform if it is legally bound to retain faculty who cannot or will not effectuate reform.

The faculty's interest is to protect academic freedom, freedom in teaching, research, and learning. The tenure contract protects that freedom and provides economic security to attract and retain people of ability to the teaching profession.[10] The tenure contract must be reformed to accommodate management's need to achieve changing educational goals and the faculty's need to protect academic freedom. The challenge lies in redefining the contract so that the abuses of tenure can be eliminated without diminishing academic freedom.

A charge that is commonly made against tenured faculty is that after they achieve tenure, they don't continue to be productive. To the limited extent this is true, it is an indictment of both faculty and management. Requiring that the standards which led to the grant of tenure continue to be met after tenure is achieved, may be a solution to this problem. Periodic review of tenured faculty would promote accountability on both sides. It would induce faculty to be fully productive and would probably enhance the morale of already productive faculty who may resent tenure abusers who are tolerated by an administration that is too lazy or too timid or too naive to enforce its right to demand a full day's work for a full day's pay. To be effective, a periodic review process would have to require that if continuing standards of excellence are not met, the faculty member be given a reasonable amount of time in which to meet them. If the standards were still not met, the faculty member should be terminated. Protection of academic freedom from arbitrary termination would be provided by a suit based on breach of the tenure contract.

Stricter standards can be imposed for those currently on tenure-track. The courts have recently found that where adequate notice is given, higher standards for achieving tenure may be imposed.[11] The Court of Appeals for the First Circuit upheld Smith College's denial of tenure to Professor Banerjee. The court also upheld the college's right to impose higher tenure standards in the 1970's than those imposed in the 1960's.[12] The court explained,

> There was substantial evidence that whereas in the 1960's good faculty had been hard to find, the 1970's saw a 'new professional situation'-a glut of qualified applicants out of graduate school, which coincided, at Smith, with a period of many fewer faculty retirements than in the decade before, and of fiscal restraints on new hiring and reappointment. The percentage of decisions resulting in tenure dropped from 89% (79/89) in 1960-69 to 74% (67/91) in 1969-76.

This continued glut on the market enables an institution to do what it should have been doing all along—not tenure mediocrity, not tenure someone because of longevity, but tenure the superstars. In other words, the question is not whether the professor is bad enough to be discharged. The proper question is whether the professor is one the institution would like to keep for twenty or thirty years.

If a tenure review system is adopted, administration should expressly reserve the right to impose higher standards on tenured faculty with adequate notice and a reasonable opportunity .to meet those standards. This may have to be done by private agreement. Imposing higher standards only on non-tenured faculty and simply holding tenured faculty accountable for retaining their status may be necessary "reforms" for schools drifting into 100% tenure. That is to say that enforcing present tenure contracts rather than treating them as contracts for life employment terminable only by death or retirement could achieve favorable results without radically changing existing legal obligations.

THE AGE DISCRIMINATION IN EMPLOYMENT ACT AND THE TENURE QUESTION

An alternative to being tenured-in achieved by a quota on tenure positions may achieve flexibility but it may also result in liability under the Age Discrimination in Employment Act (ADEA).[13] In *Leftwich v. Harris-Stowe State College*,[14] the Eighth Circuit, in March of 1983, reinstated an associate professor, finding that he was the victim of unlawful age discrimination as a result of the college's tenure plan which, by reserving some positions for non-tenured faculty, had a disparate impact on the protected age group, age 40 to 70. The Missouri legislature had transferred Harris-Stowe State College from the St. Louis Board of Education to the state college system and in so doing, excluded Dr. Leftwich from the biology faculty. One position in biology was reserved for a non-tenured faculty member and was filled by a thirty-year old white male. Dr. Leftwich, a forty-seven year old white male, was denied the tenured position in favor of a sixty-two year old black male. Statistics showed that by reserving non-tenure positions, the college adversely affected older teachers because a larger share of non-tenured than tenured faculty are under 40 years of age.

The college claimed that it needed to institute the tenure plan in order to cut expenses. This economic defense was rejected because acceptance of it would undermine the purpose of the ADEA. The college's additional reason for the plan, to promote innovation and quality among the faculty by giving flexibility, was also rejected. The court said that the college's assertion

> that younger non-tenured faculty would have new ideas apparently assumes that older tenured faculty members would cause the college to 'stagnate.' Such *assumptions are precisely the kind of stereotypical thinking about older workers that the ADEA was designed to eliminate. Indeed, the record in this case reveals that the defendants' plan may have frustrated the development of new ideas within the college because it succeeded in eliminating the plaintiff who was actively involved in research and had published several articles, while retaining a non-tenured faculty member whose contribution to new research in the profession was concededly less than that of Leftwich.*[15]

This decision should not deter management from weeding out the "burned out" faculty, regardless of age, especially when they cannot be induced to be productive. In *Chamberlain v. Bissell, Inc.*,[16] an employer won an age discrimination case brought by a 51-year old manager who was terminated because he was "burned out." He had become complacent, uncreative, and lacked initiative. He could not meet his employer's higher performance standards. These reasons justified his discharge despite the fact that the court said they may have been caused by his age and length of employment.

Although that case arose in industry, the lesson from industry should not be lost on the academic world. If a college is to survive, it must be able to compete. It can't compete if management abdicates its responsibility to deliver quality education. Even without reforming the tenure contract, a college can rid itself of those tenured faculty who ought to be discharged. Legal developments in contract law and employment discrimination make discharge of tenured faculty difficult, but not impossible. The key to a successful discharge is documentation that the faculty member has violated known rules and standards which are uniformly applied. Establishing scrupulously accurate records of infractions and following expert legal advice can result in successful discharges.

CONCLUSION

A positive approach to tenure review, rather than a threatening one suggested by a review which can lead to discharge, might be taken through a merit pay program wherein all faculty are eligible for merit pay. The review could reveal not only those who have performed meritoriously but those who have fallen behind or have simply dropped out.

Deciding who should be discharged or denied tenure is much like deciding who to hire or tenure—those decisions, if wisely made, require that the institution knows where it want to go and has established standards for getting there. The most meaningful standards will be the subjective ones, but they are also the most difficult to apply.

Increasingly, management is shared and administration and faculty are demanding that each be accountable to the other. Reform is already taking place in some institutions. It is best achieved when faculty and administrators understand that their apparently competing interests are really mutual interests in the continuing viability of higher education. Then as partners rather than adversaries, they can decide where they are going and how to get there. The courts can't and won't do that for them. The courts can and will enforce the contracts which are designed to get there.

Tenure as we have known it may be an obstacle to reform. Tenure abuses by both faculty and administrators are an obstacle to reform. But the vital freedom that tenure protects, academic freedom, is not an obstacle to reform. However, that right is not and cannot be absolute. Reform of the tenure contract must accommodate the need for flexibility with the right to academic freedom. Then the tenure contract, instead of being an obstacle to reform, can be a vehicle by which reform is achieved.

FOOTNOTES

[*] Ms. Benson's law practice at Smith & Schnacke in Dayton, Ohio, is limited to public and private sector labor relations, employment discrimination and OSHA matters, management side. The views expressed here are solely those of the author.

1. See Zahorik v. Cornell, No. 83-7450, (Feb. 22, 1984); Smith v. The University of Arizona, Court of Appeals of Arizona, Slip Opinion, No. 2CA-CIV 4493 (May 16, 1983) (reversing trial court's order of tenure); Fairchild v. Vermont State Colleges, 449 A. 2d 932, 935 (1982); D. Benson, "Judicial Protection of Academic Freedom in Higher Education," The Legal and Economic Status of Collective Bargaining in Higher Education, Proceedings, Ninth Annual Conference NCSCBHEP, April 1981, n. 4 at p. 41.

2. *Gladney v. Thomas*, 573 F. Supp. 1232 (N.D. Ala. 1983).

3. *Id.*, at 1234.

4. *Id.*, at 1235.

5. *Carpenter v. Board of Regents of the University of Wisconsin System*, Slip Opinion (7th Cir. February 23, 1984). (Tenure standards, "a minimum level of competence. . . a reasonable likelihood of future growth and performance in teaching, in research and scholarly writing and in service to the university community and to the larger community," were job related and were not applied in a racially discriminatory manner.).

6. *See* *Kumar v. Board of Trustees of the University of Massachusetts*, 32 FEP Cases 306 (D. Mass. 1983). (The court refused to award the cash equivalent of a lost tenured position for plaintiff's lifetime but awarded back pay and fringe benefits based on what plaintiff would have received had he been tenured).

7. *Daeufer v. University of Hawaii*, 659 P. 2d 720 (1983).

8. *See* *Jiminez v. Almodovar*, 650 F. 2d 363 (1st Cir. 1981); *Krotkoff v. Goucher College*, 585 F. 2d 675 (4th Cir. 1978); *Drans v. Providence College*, 383 A. 2d 1033 (R.I. 1970).

9. *See* *Toussaint v. Blue Cross and Blue Shield of Michigan*, 292 N.W. 2d 880 (Mich. 1980).

10. 60 AAUP Bull. 269 (1974).

11. *D'Aleo v. Vermont State Colleges Faculty Federation*, 450 A. 2d 1127 (1982). (In 1977 college gave notice to plaintiff that tenure criteria were changed. Tenure review was conducted in 1979-80 and tenure was denied on March 27, 1980. The court said plaintiff's grievance was properly denied because he had adequate notice of policy changes); *Banerjee v. Board of Trustees of Smith College*, 648 F. 2d 61 (1st Cir.) *cert. denied* 454 U.S. 1098 (1981).

12. 648 F. 2d 61, 66.

13. 29 U.S.C. 621 *et seq.* (1967).

14. 702 F. 2d 686.

15. *Id.*, at 692

16. 547 F. Supp. 1067 (W.D. Mich. 1982).

B. 2. IS TENURE AN OBSTACLE TO REFORM?

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INTRODUCTION

The question of tenure reform is one which makes many assumptions; the fundamental question remains "Is reform necessary?" And, of greater importance, what reform, and to what end? Because these questions have not been addressed, I have a sense of dual responsibility. To some extent, my charge is to refute unspoken accusations. And to some extent, my charge is to contribute to the on-going clarification of the nature and role of academic tenure in American colleges and universities in the 1980's. The answer to the question is, I believe, an unequivocal "no." As it happens, I addressed this conference in the spring of 1979 on a related topic, "The tenure system: are other approaches possible that will still protect academic freedom and assure security for qualified faculty?" The answer to that question was "no" as well. Tenure remains essential to the fundamental mission of higher education in American society in two ways: first, as the established method of providing job security to faculty in American colleges and universities; and second, as the fundamental and irreducible protector of academic freedom.

TENURE AND JOB SECURITY

Some dismiss or deny the fact that tenure is, at base, the academic form of job security. They feel, perhaps, that this fact somehow denigrates the role of tenure as the guarantor of academic freedom. Yet, in any field of endeavor there must be an established mechanism for the provision of job security to those who have demonstrated satisfactory performance during the expected probationary period. If there is not, barring inhumanly perfect management, the inevitable will occur—arbitrary dismissals, and the consequent demoralization and deterioration of performance through fear, hostility, or apathy. The standard of no dismissal without cause recognized by academic tenure is, in fact, a standard which is widely respected and sought after.

In passing, I would like to note that those who minimize or deny this fundamental aspect of tenure are, I believe, doing a disservice to our profession. At a time when our colleges and universities need a broader base of public support and a substantially increased level of public understanding, creating a mystique of academic exceptionalism is not in the best interests of precisely those distinctive features of academic life which we wish to preserve. I would suggest that highlighting the job security aspects of tenure rather than denying them, and explaining that we wish to insure that there is no dismissal without cause, would be very much in our common interest.

Tenure is the fundamental guarantor of academic freedom precisely because of the job security aspects of the academic tenure system. For academic freedom could not exist without a proper system of job security. If basic guarantees of job security were not inherent in academic tenure, we could not have the honest intellectual pursuit of ideas in the classroom, the laboratory, or the library. And, the maintenance of academic freedom remains essential if our colleges and universities are to fulfill their function of testing, developing, and conveying new ideas, alternatives which add to human understanding, and innovations which expand our universe. I believe that the vast majority of academic administrators would agree to this description of the essential importance of academic tenure and academic freedom. Yet, some current trends in higher education indicate that many administrators do perceive tenure as an obstacle to something, perhaps "management flexibility," if not reform. Observation reveals several types of management attacks on the academic tenure system.

TENURE UNDER ATTACK

One type of attack on tenure appears to be on the decline, largely because of its ineffectiveness. This is the attempt to substitute fraudulent, quasi-tenure systems for regularly established systems of academic tenure. Multi-year renewable tenure, cyclical tenure, and similar plans were typically presented as new and innovative alternatives. In fact, they were attempts to replace an institutional commitment to continuous employment subject only to dismissal for cause, financial exigency, and certain instances of program elimination - that is, tenure - with periodic *de novo* reviews of faculty, eliminating any assurance of long-term professional security, and thus endangering academic freedom. These systems were typically recognized for what they were, were resisted, and, I believe, need no further comment.

A second type of attack on tenure, however, is quite alive and well. That is the abusive use of reasons based on the purported financial condition of the institution or on alleged program needs - that is, other-than-cause reasons - to deny tenure to tenure-track faculty during their tenure review, or to justify dissolution of tenure for faculty who have already obtained it. In the broad area of financial conditions - financial exigency or anticipated financial problems - there are few pro-faculty precedents outside of those established through collective bargaining. There is no established tradition governing the standards of proof to be met, and there is no established pattern of due process to be followed. Unfortunately, these circumstances open the entire area of institutional finance to administrative offensives against tenure for those academic administrators who are looking for an arena in which to mount such an attack.

The above characteristics - the absence of well established standards of proof and due process, also make assertions of program need relatively convenient for administrators with an interest in limiting tenure. The potential for abuse in areas of alleged program need is heightened by too-frequent external pressures for quick responses to changes in "student demand" and by politically generated pressures for career-related programs or initiatives in economic development.

The third major area of attack on tenure is the most important of all. This is the alarmingly large - and apparently growing - number of off-tenure appointments made to a bewildering variety of positions - part- and full-time adjuncts, temporaries, "no rank" faculty, academic professionals, academic staff, continuing education professionals, faculty associates, and many others. What all of these positions have in common is a very critical core of characteristics: their occupants perform the same work as is done by others with tenure-track faculty appointments, but they do this work with fewer benefits and lower pay, typically receive no annual salary increases, enjoy little or no participation in institutional governance, are usually excluded from research funds and faculty leaves, have no access to the tenure-track faculty grievance or appeals procedure, and, no matter how many years of service they have completed, they have no job security whatsoever.

This category of attack upon the tenure system is the most fundamental and the most insidious. Largely invisible, it is creating a substantial second-class group of citizens within our institutions. It tends, the world being what it currently is, to contribute directly to discrimination against women and minorities. By creating an academic proletariat, it threatens the integrity of the academic institution itself, isolating a category of persons who, while doing fundamentally equal work, are receiving very different rewards under very different working conditions. It is a threat to morale and to academic quality. And, of course, this attack upon tenure creates a situation in which, for that growing group of the "de-tenured," academic freedom is in jeopardy.

I recognize, of course, the unfortunate current condition of the external world insofar as economic and political support for higher education is concerned. With very few exceptions, financial support is grossly inadequate. Trustees, governors, and state legislators are demanding career training, economic development ventures, and quick results, at the same time that cries to "compete" in "the market" in high demand, high tech areas threaten the destruction of the basic liberal arts core of our colleges and universities. I recognize that some academic administrators view what I have described as attacks on tenure as straight-forward, unavoidable responses to the external realities I have just outlined. Nonetheless, attacks on tenure have the predictable undesirable results, no matter what the motivation and regardless of the description offered. Instead, creative exploration of some alternate directions is in order.

COOPERATIVE EFFORTS TOWARDS REFORM

Higher education is a creature of politics, and we would be well advised to admit that fact. Public higher education exists because of a long history of explicit public policy decisions made by politicians in response to the demands of numerous constituencies. Much of private higher education currently exists as a consequence, as well as of clear-cut political decision-making. Creative, assertive political action and public relations activities are in order. We need to explain our institutional needs in comprehensive terms. We need to convey our concerns in comprehensible ways. Academic administrators, particularly those in the public sector, who have been especially remiss, need to be in the forefront of this new initiative, rather than cautiously sheltered from the public eye. Further, they need to actively seek and publicly recognize the cooperation of their faculty unions, rather than acting as if such cooperation might lead to accusations of illicit collusion.

Such activity and such cooperation will yield a two-fold reward. First, it will help secure funding, protect endangered programs, and build general public support for our institutions. Second, such administrative initiatives are essential if faculty cooperation is to be secured in making the somewhat painful internal institutional changes which may, in fact, be necessitated by external realities when all is finally said and done. If administrators have not gone the extra mile - clearly and convincingly - to make the case for funding, to argue the need to preserve the history degree, to protect the teacher education program, to find the additional new monies for the technology program without cannibalizing English, they cannot seriously expect faculty cooperation to be forthcoming.

PRESERVATION OF TENURE

I believe that, under the proper conditions, the academic tenure system and the academic freedom which it safeguards can be preserved and extended to those groups now unfairly trapped in "off-tenure" ghettoes, and that, at the same time, the ability of our institutions to respond to change can be enhanced. What are those conditions?

Foremost, I think, is the presence of a conviction among faculty that the administration of their institution is committed to preservation of tenure, program, and faculty positions. That conviction - or the absence of it - is one which will be based on the record. As I have suggested, assertive and public administrative action in behalf of all aspects of the institution is essential for this to occur. Additionally, where financial threats and possible program cutbacks are entailed, the administration must - in appearance and in deed - be as diligent in cutting its own ranks as in cutting the ranks of the faculty.

A second and related condition is the presence of proper and fully enforceable institutional policies in the key areas of tenure, termination for cause, and layoff. It is simply a truism to note that faculty, as other humans, will be more receptive to new directions when they know that their basic rights and essential well-being are secure. Tenure rights must be unquestioned. Procedures for termination with cause must follow established standards. Layoff policies must both protect tenure and contain rigorous standards of proof and due process. Abuse of financial and programmatic reasons for denying or dissolving tenure must be prohibited, as must improper "off-tenure" appointments.

As a passing point of advocacy, let me note that I believe that proper policies are more likely to be established through collective bargaining than through advisory approaches, and that full enforceability is virtually never present without collective bargaining. In my view, negotiated policy enforced through a contractual grievance procedure is considerably more likely to be effective in resolving the problems of an institution than are policies or procedures devised in other ways, both because negotiated policy is the result of the bilateral give and take of negotiations, and because the negotiations process itself engenders a bilateral commitment to defending and implementing the policies established in that very negotiations process.

A PROSPECTIVE LOOK

There are two areas, at least, in which new initiatives should prove productive. One is the issue of early retirement, in conjunction with companion programs of prerogatives for the emeritus faculty member. I have in mind such companion features as guarantees of part-time teaching, use of office space, library, and computer facilities, access to the institution's office of development or research, and some continuing recognized participation in the life of the institution. From the point of view of the faculty member, such prerogatives can convert the prospect of retirement from that of a sudden severing of all ties to his or her on-going professional life to that of a desired erasing of demands with the essential elements of self-definition and continuity of purpose intact. From the viewpont of the administrators, such programs may facilitate internal reallocation of resources to new areas, while enabling the institution to continue to benefit from the contributions of colleagues with enduring commitment and a solid understanding of the institution and its mission.

The other area needing exploration is that of transfer and retraining. These are concepts which have too often been rejected by faculty and administrators alike, perhaps because of implications of coercion, perhaps because so little has been done to highlight the constant faculty "retraining" and the not infrequent faculty transfer which already occurs. Indeed, the very pace of change which leads us to consider establishing formal programs of faculty retraining may well have created an academic environment in which retraining will be easily accepted. Administrations can do much to promote faculty acceptance of new initiatives in this area, despite the fears of many. Institutional financial support is the key, of course. Academic administrators can make a major contribution toward defining retraining and/or transfer as a valuable indication of professional growth and a respected contribution to the welfare of the institution rather than as a forced and unprofessional accommodation to undesirable outside influences.

Of course, institutional policies need to be shaped to promote such new directions. A guaranteed contractual opportunity to avail oneself of retraining at institutional expense is a potent factor in reshaping faculty response to the prospects of program elimination or cutbacks. And the knowledge that one will be transferred, with tenure, when retraining is successfully completed, is essential as well to faculty acceptance of retraining and transfer.

CONCLUSION

More could be added, but my point is that these new directions, which will help adapt to change, not only do not require the abolition of tenure but will be far more effectively implemented in the presence of a strong and effective system of academic tenure.

Those who make the argument that tenure is an obstacle to reform, both misunderstand the institution of tenure and overlook an important psychological fact. Reform is most successful when those whose participation is essential can be confident that the reform in question does not jeopardize their basic well-being.

CONCESSION BARGAINING
C. 1. CONCESSIONARY BARGAINING IN HISTORICAL PERSPECTIVE

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INTRODUCTION

One of the repeated, and I must say realistic, benefits of history is that it provides a perspective on current developments. This is quite different from the old saw that those who do not know their history are doomed to relive it. History does not repeat itself, nor does it have a predictive quality. The present is never the same as the past. However, enough is similar, or at least suggestive, so that history provides categories for analysis and suggests the dynamics for explanation. This is certainly true for collective bargaining in higher education. Such bargaining is fairly recent, and thus we tend to view it as unique and somewhat erratic. In fact, there are many common features with labor relations in other times. A study of that larger history can thus be helpful in understanding the more limited area of collective bargaining in higher education.

I intend to present such an overview briefly in this paper, with a focus on the factors that encourage management to demand concessions from unions. I will first indicate the major factors involved, and then spend the majority of my time in examining how unions have fared in different periods.

Before examining the long-term trends, let us look at 1983 for some idea of what concessionary bargaining means. That year was one of partial recovery from the recession of 1981-1982, yet the pressure for concessions was strong. On the wage front, nineteen percent of union contracts, negotiated for units of 5,000 or more workers, contained a decrease in wages and benefits; six percent showed no change; and eleven percent had increases under two percent. These workers suffered a real wage loss. On the other hand, forty percent of contracts contained increases of four to six percent, which meant a real wage gain. Employers sought to weaken or eliminate cost of living adjustments in many union contracts, but labor generally resisted this concession successfully. Unions had less success in meeting the use of bankruptcy proceedings to void collective bargaining agreements. To date, the labor movement has not been able to overcome adverse court decisions on this issue by legislation.

Using an alternative tactic, several major firms, such as Greyhound and Phelps Dodge, accepted long strikes as part of their drive for significant concessions. Job displacement continued for a number of reasons, and unions could do little to improve existing programs. A major initiative by the AFL-CIO for a national industrial policy, based on cooperation among labor, business and government, has yet to advance significantly. Finally, in the area of fringe benefits, employers have demanded, and increasingly gained, concessions in health insurance plans. Management resisted the higher costs produced by the escalating price of health care. Unions responded by accepting cost cutting regulations. This is a quick sketch of what concessionary bargaining means in the present. Now let us view the situation historically.

CRITICAL ELEMENTS

A. Union Strength

Several major factors are important in determining the course of collective bargaining. First, there is the strength of the union. Strong unions not only strike less, but they can better deflect concessions especially if the economic situation is not strongly negative for a long period of time. Important in assessing a union's strength is not only the percentage of employees organized, but the willingness of the members to support the union leadership, the quality of that leadership, the political influence of the organization, and the ability of the union to impose a significant economic penalty on the employer, usually through a strike.

B. Economic Conditions

Second, the economic conditions in the country and in a particular industry are of central importance. This situation is always open to the macro or micro view. From the latter, certain industries are depressed even when the economy as a whole is prosperous. Such a decline often involves technological change. Management usually demands significant concessions. Unions often resist for reasons I will discuss in a moment.

From the macro point of view, the picture is simpler. When the economy as a whole is in depression (or since that word is rarely used anymore, recession), most major segments are affected. Management, once again, demands concessions since it faces the squeeze of costs assumed in happier times and the sinking revenues of a recession. In these cases, unions are often more willing to make concessions since they view them as temporary and related to general economic fluctuations — which are regarded as favorable over the long run. In contrast, a sick industry does not get better through the operation of the business cycle; it requires more major treatment. Unions fear that this will result in severe and lasting concessions, and thus they are more reluctant to make them. Obviously, the situation is delicate for union leaders. They often recognize that changes are needed in a troubled industry, yet they resist concessions that seem permanent, and that significantly lower the existing union standards.

C. Management's Perspective

Third, just as the strength of the union is important, so is the attitude of management. This can be independent of the state of the economy as illustrated by intense anti-union campaigns in the 1904-1910 period and the 1920's — both times of prosperity. The attitude of management toward unions is also not merely a function of the prevailing political climate. In the 1904-1908 years, President Theodore Roosevelt was the national symbol for a vigorous progressive movement. On the other hand, in the 1920's, political conservatism combined with a strong anti-union movement in management. We also must recognize that employers generally are most hostile to unions before they have to deal with them. Opposition to the initial unionization is quite often stiff, and some of the most bitter strikes in American history revolve around the organization of workers. There are fewer examples of employers who try to eliminate unions once they are in place and have gained some strength. However, we have seen instances of this in recent years, and there are historical examples, such as the Homestead Strike of 1892. This, of course, is the ultimate concession. Historically, American employers have blended the practical and the political, the immediate and the ideological, with results that vary from period to period, industry to industry, and even firm to firm.

In sum, during the average length recession, unions and management are generally flexible; most of a contract is maintained even though concessions are made. The crunch develops when the decline becomes long-term, either for the economy generally or for a particular industry, or when political and ideological matters become a major influence. Let us now consider how these factors have worked themselves out in particular time periods.

HISTORICAL SURVEY

In the period from the 1820's to 1880, American unions did not have to worry about major concessions since a significant decline in the economy led to the collapse of the organizations themselves. This was the case in 1837, 1857 and 1873. Unions organized in good times, but lacked the strength to survive bad ones.

This situation ended in the period 1880-1897. During these years, there was a sharp downturn in 1883-1885, and a major depression that began in 1893. Yet the unions generally survived. In both declines, concessions were almost universal. Long-term contracts were unknown, and many employers tried to reconcile labor costs to even seasonal changes in the business outlook. Thus any downward turn in the economy generally, or in an industry, led to pressure on the workers for concessions in wages and working conditions. The latter involved union rules about the amount of work to be done. Employers sought increases in productivity to lower the cost per piece. This was particularly true where competition existed, as it did in many sectors of the economy at that time.

The following period, 1897-1917 was similar in many ways to the years 1949-1970, and I would like to consider them together. Both periods were marked by general prosperity with occasional and relatively short recessions. During these downturns, including 1907, 1914-1915, 1953 and 1957, unions faced demands for concessions, but there were few crises in bargaining because employers and unions recognized the cyclical character of these recessions. Thus concessions could be retrieved in a succeeding period of prosperity. Overall, workers made substantial gains in real wages in both periods. Thus concessions in the downturns usually were transitory, and they were more than offset by the gains made within a generally prosperous economy.

In a sustained period of prosperity, even a severe attack on unions is not enough to reverse gains. Thus the open shop campaign of the first decade of the Twentieth Century did slow the growth of unions, but it was unable to achieve its basic purpose: to gut the union movement by attacks on the closed shop, union work rules and collective bargaining. In the post World War II years, the Taft-Hartley Act and related attacks did not significantly weaken the labor movement despite the fears of some at the time. Right to work laws represent another effort to weaken unions. They span periods of sustained prosperity and recession. In good times, their effect is once again to slow unionization, but they do not lead to fundamental concessions by the labor movement. In contrast, the open shop campaign of the 1920's was quite successful, for reasons that will be discussed later.

Thus despite the attacks on unions by employers, and despite some concessions made in times of recession, long periods of prosperity encourage gains by unions. In such periods, concessionary bargaining is peripheral to the main line of negotiation.

THE GREAT DEPRESSION

If we look at the other side of the coin, we must examine the Great Depression of the 1930's. I will discuss it in tandem with the 1970's, a period of decline not as severe as the 1930's, but still important in itself.

To understand the appellation "Great" for the depression of the 1930's, one has to ponder an official unemployment rate that rose from three percent in 1929 to twenty-four percent in 1933, and that was still twenty percent in 1935. In the construction industry, for example, the amount of building dropped by one-half between 1929 and 1933. Although the magnitude of the depression of the 1930's was enormous, in the years to 1933 the effect on the labor movement was not unique, however severe. As usual in periods of decline, unions had to make concessions. However, most unions survived. The labor movement then recovered and actually expanded after 1933 as the New Deal introduced a different political and economic environment. The New Deal reached out to the worker as an individual and to the labor movement in ways unknown before. Legislation such as the Social Security Act illustrates the first trend, and the Wagner Act was the key element in the second. The Wagner Act helped the CIO organize in the basic industries during the late 1930's, but it also strengthened the entire labor movement. Together with some improvement in the economy, the impact of these developments was to reduce concessionary bargaining during Franklin Roosevelt's Administration.

Clearly, the period after 1933 was a departure from the usual situation in depressions. The labor movement actually grew stronger in numbers and influence. In large measure, this reflects the extreme severity and length of the Great Depression. This placed the employers on the defensive, undermined long-standing values that stressed individualism, created a broad political coalition under the New Deal that stimulated public support for the labor movement, and allowed the concept of the welfare state to replace limited government. It was a combination of circumstances not likely to be repeated, and certainly there was no such development during the recessionary decade of the 1970's.

THE SEVENTIES AND EIGHTIES

In the 1970's, the decline in the economy was not as severe as in the 1930's, but the effect on the labor movement has been quite negative. The 1970's offered the previously unknown combination of inflation and a slowdown in economic growth. In addition, the pace of technological change increased which added a new source for unemployment to the more general ones. During the 1970's, the official overall percentage for unemployment ranged from a low of 5.2 percent in 1972 to a high of 9.1 percent in 1975. This trend has continued into the 1980's. In contrast, in the generally prosperous period from 1946 to 1970, unemployment was below five percent in sixteen of the twenty-five years, and below six percent in all but two years. High interest rates hurt industries that depended on consumer borrowing, such as the automobile industry and home construction, and tended to discourage new investment more generally.

These developments are recent enough to be familiar. Those of us in academic life certainly have noted that our real wages have fallen rather sharply over the last decade. Other groups of workers also experienced a decline in real wages that began in the 1970's and has continued until the last year or two. Both public and private universities faced financial difficulties in the 1970's as costs rose dramatically while revenues failed to keep pace. Again the parallel to many other industries is clear. The result also was similar: throughout the American economy, management demanded concessions from workers, be they unionized or not. These were usually described by workers with the more expressive term, "givebacks." In line with the historical trend, many unions made important concessions in the 1970's and into the early 1980's during this period of sustained recession.

These concessions went beyond changes in wages and fringe benefits. In many industries, management demanded changes in work practices, which, combined with technological change, reduced the number of jobs. As mentioned earlier, unions have been reluctant to accept such concessions. However, in a sustained period of economic weakness, they often do so. The area of technological change is one in which many union contracts have little real impact. Thus opposition would involve a major move into management's area of responsibility — something quite difficult to do when a union is in a weak bargaining position.

Finally, let us look briefly at the early 1980's and the period with which it is often compared — the 1920's. The two periods are not identical. The years 1981 to early 1983 were ones of depression; from 1922 to 1929, there was general prosperity with low unemployment. However, there are important similarities as well. Both periods were marked by a generally conservative political outlook with strongly conservative presidents. Employers built on this situation to attack unions severely, and to demand concessions. In both periods, union membership declined. However, opposition from employers was only part of the reason for this drop. Of great importance in the 1920's, were changes in the economy — principally technological developments and a shift of workers into the more poorly organized service occupations. In the early 1980's, the same factors are at work, supplemented by increased competition from abroad, which has hit hard at unionized industries such as automobiles, steel and clothing. Thus despite the generally favorable economic conditions in the 1920's, particular economic factors, combined with political and ideological conditions, created a period of concessionary bargaining and intense pressure on unions.

SUMMARY

From this brief survey, we can see that concessionary bargaining has been part of broader trends within the labor-management relationship. These have been determined by a number of major factors. The most important of these is the general economic situation in the nation, although developments in a particular industry may well run counter to the general trend and be more significant. Yet, in general, concessionary bargaining has been cyclical. Caution is necessary, however, since other factors we have discussed can have an important impact. Thus there are deviations from a rigid connection of concessionary bargaining and the business cycle. Over the long run, unions have gained much more than they have conceded. Though no historian would dare predict the future, I see no reason to believe that gains will not continue to exceed concessions in the years to come.

C. 2. CONCESSION BARGAINING

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INTRODUCTION

The issues of this Conference—"Structural Reform in Higher Education Collective Bargaining"—are an appropriate follow up to the subject of last year's Conference: "Collective Bargaining in a Period of Retrenchment." At last year's Conference, some of the issues and impact for the future of higher education and collective bargaining were addressed in the context of projected declining enrollments, cut-backs in Federal support, and eroding state support for higher education.

Thus, this year's theme is a logical successor theme: how do we restructure higher education to deal with the realities of enrollments and budgets? I guess one possible sub-title for this year's conference could be "How to make a meaner and leaner higher education system for the next decade without sacrificing quality." In that spirit, the topic of concession bargaining is appropriate to consider as an aspect of the structural reform in collective bargaining.

The gloomy forecast for higher education in the next decade is an appropriate introduction to the topic of concession bargaining for it is a major premise for both the necessity as well as the successful outcome of concession bargaining.

The factors which will lead management in higher education to seek concessions in collective bargaining in the 1980's are probably obvious to this audience.

We read daily of concessions sought and increasingly won by employers in industries such as transportation, automobile manufacturing, and other major industries caught in the squeeze of increased costs for energy and fuels and in many cases a rival market producing the same or better goods and selling them for less. Obviously, we have direct analogies in higher education today.

Higher education, as we know, is rather labor intensive. Japanese robots may help to make better automobiles more cheaply. Although learning machines have been invented, my guess is that Japanese robots are unlikely to replace faculty in any significant numbers during the next decade.

While colleges and universities will seek to control, contain, and obtain efficiencies in the hard budget items, colleges and universities will predictably seek in the 1980's to reduce or contain personnel costs. Ultimately, there are only several ways to do this: use fewer people or pay people less money. Paying people less money is not a popular topic—particularly with employees. Since most of this audience consists of employees of one title or another, the voluntary sacrifice of one's personal income is hardly a popular prescription. It is a subject that cannot be avoided, but I will try to sneak up on the topic.

The AAUP's Annual Report on the Economic Status of the Profession portrays in gloomy terms the decline in purchasing power of average faculty salaries. However, recent AAUP data show that in the past two years, with the decline in the CPI since the double-digit years of 1980 and 1981, average faculty salary increases in the United States exceeded the increases in the cost of living in both the '81-82 and '82-83 academic years.[1]

While the AAUP bemoans the decline in real dollar purchasing power over the past decade, perhaps Academe—and academia generally—fails to explain or analyze where the money is to come from to have faculty salaries automatically keep pace with and exceed the cost of living. Is it to come from greater beneficence from government in the case of publicly supported institutions? I suggest as a thesis that such suggestions—with local exceptions—are pipe dreams: they ignore the realities of a declining student body, less governmental support for higher education, and escalating cost increases in non-controllable items.

This is not to suggest that faculty or any other category of employees in higher education should be expected to bear the brunt of the fiscal realities of the 1980's. What I intend to suggest is the thesis that, like any other industry, in higher education management must and will look to economies in order to maintain all facets of the operation—including appropriate salaries for faculty and other employees.

MANAGEMENT VIEWPOINTS

A. Productivity Increases

From management's perspective, in order to stay solvent and generate wages sufficient to attract and retain quality faculty, management must and will seek concessions. What kind of reasonable concessions can we anticipate will be sought? Obviously, productivity increases are a traditional means of increasing the dollars available for distribution to employees. But productivity increases in higher education can be costly if they are obtained at the price of diminished quality. Increasing class size and faculty workload assignments are two obvious steps any institution can take to reduce its faculty costs. But if doing so dries up scholarship and quality of instruction, the savings may be illusory and short-term, with long term liabilities for the institution.

I think that it is safe to say that the 1980's will see greater attention by management to such matters as class size and faculty workloads. In particular, greater attention can and will be paid to measurement of workloads to insure that all faculty are carrying their share of the workload. Any institution which acknowledges the need and value of faculty research and scholarship will have to be careful not to throw out the baby with the bath water. Methods of calculating release time from teaching for research and scholarship must be developed and difficult questions involving the extent to which the institution can and will self-finance research that is not grant supported must be addressed. As the pinch of declining enrollments is felt, there is a great risk that faculty in fields for which there is little available grant support may be subjected to pressures their colleagues in fields for which grant funding from government or industry is available are not subjected to. It would be sad to find that philosophy, the classics, art, literature and similar fields dry up because the teachers in such disciplines lack external funding sources and their institutions lack the intellectual commitment to support learning even when the books don't balance.

B. Tenure Quotas

Admittedly, there are other means by which institutions can make economies: the bug-a-boo of tenure quotas may become a reality for many institutions. With the 1982 increase in the mandatory retirement age from 65 to 70, there will be less turnover in faculty positions. That coupled with shrinking enrollments indicate fewer available tenured positions in all but the growth fields.

The AAUP has declined to support the uncapping of mandatory retirement. In doing so, the AAUP stated that its principal reason for doing so was its desire to avoid freezing available tenure slots.[2] I think that in terms of concessions sought by management, faculty bargaining units may find a mutuality of interest in seeking to open tenure slots by encouraging early retirements. If properly handled, early retirements can provide financial savings to the institution while simultaneously increasing the number of faculty jobs. The incentive for faculty to do so should be obvious. If, however, the price tag sought by faculty is a net deficit for the institution, there is little incentive for the institution to pay that price.

C. Mandatory Retirement

The reason the national AAUP declined—with reluctance—to support the uncapping of the mandatory retirement age is a message for concession bargaining because I believe that it exemplified the factors which aid in successful concession bargaining.[3]

In opposing the uncapping of mandatory retirement age limits, the AAUP committee looked at the broader and more drastic impact on the profession that would be necessitated if uncapping took place. The AAUP acknowledged that while mandatory retirement was a loss of benefits to some, more faculty members would be harmed by the loss of jobs and budget if there were to be uncapping. This illustrates, I believe a fundamental principle for successful concession bargaining, namely, recognition by the Union and employees of the greater losses that will occur if concessions are not made.

SUCCESSFUL CONCESSION BARGAINING

Achieving concession bargaining requires an educational component to the collective bargaining process. If the concession that is sought is so important that it will be obtained "at any cost," the cost may indeed be quite high. But if the concession is to preserve and strengthen the institution, there must be a willingness to demonstrate the following:

The concession is needed or justified for the continued "good health" of the institution.

The concession in fact will not hurt individual employees or that the loss to individual employees from the concession will be less than the great dislocations that would be caused if the concession is not obtained.

I have not mentioned financial exigency because I think that that is unnecessary for a discussion or analysis of concession bargaining. If the institution is facing a situation of financial exigency, the concession bargaining is easier. But the reason I am not focusing on financial exigency here is to suggest that the time to do good faith concession bargaining is before financial exigency occurs. Properly done, concession bargaining is to avoid financial exigency. Rational and reasoned sought after concessions in many cases can honestly be introduced by saying if there are not concessions in this area, the cutbacks will be more severe, more ruthless, deeper. The cost reductions and efficiencies sought now will help to avoid financial exigency.

I start from an assumption—which I hope is not overly naive—that reason and rationality do have a role to play in collective bargaining. Those of us who have been at the table know that the relationship of rationality and reason to collective bargaining may at times seem remote but since it can be present, it is worth stressing the role that reason and rationality play in concession bargaining.

Unless the concession bargaining stems from a pure power play—the side seeking the concession has the economic and political power in the situation to get whatever result it wishes, reason and rationality are important in order to have the other side understand that the goal of the sought after concession is not to weaken the other side's role, but is to establish or re-establish a rule, a wage scale, a workload or system which is necessary for the health of the enterprise. I stress that one of the principal tasks of management in seeking concessions from the union is to lay a foundation based on reason and rationality. The costs of a particular benefit or work schedule may be excessive and out-of-line with the area or other bargaining units at the institution. A work rule intended originally for one purpose may have taken on such meaning that it is counter-productive and entails duplication of costs. Since the "pie" is finite in size and can be sliced into only so many pieces, it is important to be able to show that the concession that is sought will not destroy the union but may actually preserve jobs or enhance jobs and the alternative of continuing under the status quo will actually have more and greater adverse consequences for the Union or the bargaining unit.

The above cannot be done by sleight of hand. Union bargaining agents in higher education as elsewhere are not ignorant. Everyone at the table has a pocket calculator and can add, subtract, multiply and divide. Accordingly, I suggest that one of the first tasks in concession bargaining is to be able to effectively and honestly lay out the basis and reasons why the concession is important and needed, as well as the consequences if the concession is not obtained.

A. Identifying the "Concession"

Analysis of who is affected by a proposed "concession" is essential for both management and the union alike. The recipe for achieving the concession on terms which are satisfactory to management and which can be accepted by the rank and file when the contract is proposed for ratification requires that both management and the union be able to analyze who is affected by the proposed change. This may be an area in which rationality and reason are not possible. At a formal bargaining session, it may be difficult for a union to admit that some members of the bargaining unit have a better situation than others or that a work rule has been abused. I suggest that management probably should not look for open and honest communication from the union on this point. The limits of collective bargaining as it is presently practiced may be that management must give the union the facts and reasons the union needs to be able to go back to its caucus and say: "management is not entirely wrong on this point."

In analyzing concessions, I think that one can identify certain groups of "concessions." Each has its own interest and value to the parties. The nature of the concession may determine whether it should be achieved through a unit-wide trade, through a buy-out, or simply as a contribution by the Union to the continued health of the institution.

One group of concessions involves specialized benefits, rules, practices, rates of pay, or other items which affect only a portion of the bargaining unit. The second group of concessions involves those items which affect or potentially affect each member of the unit or which affect the unit as a whole but no individual members. To put it another way, an item which affects the Union, not the unit. A classic example of this would be a reduction in force to be achieved through attrition. Such a plan in theory affects no individual employee; yet the consequence of the plan will be to reduce the size of the bargaining unit, and thus the strength of the union.

One value of analyzing who is affected by the proposed changes can be to permit selective implementation. The "buy out" of a costly benefit may be offered for the entire bargaining unit. It can also be offered in such a way that it is targeted to those who are directly affected. Similarly, management can offer or the union can seek to have differentials: one group can be grandfathered, but new employees do not get the benefit of the old rule or old schedule. The job or wage rate may be red circled so that incumbents retain it but there is acknowledgment that there will be no additions to the list of persons on that schedule or rate.

Countless variations are possible here: the "save harmless" guarantee may be a way to introduce a new schedule of hours, overtime, merit pay, or other item—under a save harmless provision, all affected employees are guaranteed that they will not do worse than a particular level. The use of a save harmless provision may be a "risk free" method of introducing or trying a new schedule of hours or wages. Generally, save harmless postpones the day of reckoning to the next contract—but the postponement may be of value to both union and management alike. In the subsequent negotiation, if the new schedule has worked, management will seek and the union—based on its experience under the new scheme—may accept dropping the guarantee and institutionalizing the new method. A variation on the "save harmless" technique of introducing a change on a provisional basis is the use of an "experimental clause" permitting the introduction of cost-saving or other devices on a trial basis.[4]

I stated initially that containing personnel costs is ultimately a drive to pay less money to get the job done. Since most employees are generally unwilling to take a pay cut, in concession bargaining one may have to find variations which reduce personnel costs. If paying people less money is doing things the hard way, it may be worthwhile to explore the other side of the coin: using fewer people. To borrow Professor Birnbaum's phrase, "Creative academic collective bargaining" may be necessary.

Using fewer people to save money is actually an amalgam of several different concepts—or to put it another way—there are many different formulations of how this concept can be applied.

The simplest case is a flat reduction in personnel. Fewer people on payroll equals (theoretically) lower payroll costs. But there are other approaches which may emerge in concession bargaining. Variation number one on "use fewer people" is use people who are paid at a lower rate. This is not necessarily the same as cutting the rate of pay of the existing work force. It can be as simple a device as differential rates of pay: current employees are "grandfathered" at a current pay rate; new employees, however, will start at a lower pay scale.

There is another variation and this is to invoke the buzz word "productivity." If Mr. X can produce a little more, if Professor Y can teach an additional section, we don't need to hire that one additional person or fraction of a person. Thus, so the theory goes, if we can increase productivity, we can improve output without increasing personnel.

I'm sure that few of these concepts are strangers to your collective bargaining vocabulary. While they are appropriate and valid items for collective bargaining, there are other concepts which are unique to higher education which can and should be brought into this discussion.

In addition to increasing workloads or class size, other devices for decreasing personnel costs while maximizing faculty opportunities and job openings have been suggested. These include the total abolition of tenure or at least prospective abolition of tenure for new and untenured faculty; cyclical, "renewable" or "limited-term" tenure. Another device for containing faculty personnel costs is to tie salary increases to productivity in the form of merit increases or, in the more radical formulation, to tie faculty salary increases and decreases to performance. Some of these concepts are discussed in the Report of Committee A of the AAUP regarding the "Uncapping of Mandatory Retirement."[5]

B. Merit Pay Plans

Merit salary increases or a program in which salary decreases as well as increases are linked to performance can contain personnel costs. It may have the effect of allocating the increases to where they are truly deserved and thus targets salary better than across-the-board increments or increments based on longevity. To the extent that the merit pay structure is tied to productivity or to factors which correlate with academic productivity, such a salary structure may help to increase productivity. I am not familiar with any data which establishes or refutes this possibility. My experience with merit pay structures—and we have merit salary increases for faculty at Boston University—does lead me to believe that a merit pay structure does save money precisely because it does target salary increases to where they are due. In order to both attract and retain quality faculty, financial incentives are necessary. Given that those financial incentives or market pressures are a factor in attracting or retaining quality faculty, to the extent that salary dollars are targeted to faculty who deserve and can command the increases instead of being split between those faculty and faculty who have not performed, there are cost savings.

The issue is not how merit is to be measured or who is to measure it. The fact that the measurement may be difficult is not an excuse for avoiding the issue. I submit as a thesis that if the consequence of the tenure system is that a faculty member who shows up to his classes sober cannot be fired even if he does nothing else or little else, a system of salary rewards and even salary decreases may be the logical and necessary consequence of an unchanged tenure system, particularly in the coming decade. In creating an econometric model, one starts from the fundamental theorem of economics that there is no such thing as a "free lunch." Thus, if funds for salaries are limited and increases are necessary to attract and retain quality faculty, I suggest that it is a form of "free lunch" thinking to suggest that all faculty will receive the same increments or that all faculty will receive a basic increment with the "extra" pay for the quality coming from some unknown source.

Absent a change in the tenure system, it is likely that merit pay increases and salary decreases for faculty will become an inescapable issue in collectivee bagaining. The alternative might well be across-the-board pay freezes or pay cuts. Whether an institution can maintain quality for an extended period of time if it cannot respond to market pressures to attract and retain outstanding faculty is a question the advocates of an egalitarian faculty salary structure may be forced to answer during this decade.

C. Use of Adjunct Faculty

Another obvious cost-saving device is greater use of adjunct and part-time faculty—a concept discussed in some detail at the Tenth Annual Conference of this Center.[6]

At the same time that colleges and universities are attempting to contain the rise of personnel costs, the institutions are seeking to find ways to reduce the net cost of a student's education by finding new and more financial aid for their students. A college's students are a resource. If a college student can be given a paid job by the college, that act can simultaneously provide financial assistance to the student to help the student in meeting his or her tuition and charges and also reduce the net personnel costs of the college if the student is hired at a lower rate of pay than a full-time employee or receives fewer or less costly fringe benefits.

Obviously, in speaking about the use of students as employees we are focusing primarily on non-faculty positions. I know of some radical or radicalized institutions in which the view abounds that the quality of education might improve if all professors were replaced by students. I hasten to add that I do not happen to share that view and am saved from harsh questioning on this point by pointing out that that issue is for another panel or another conference.

The issue of the use of students instead of (or, to put it bluntly, to replace) bargaining unit employees is not a simple issue. To those members of the audience who share my profession, you will be happy to know that there is a host of legal issues involved in this topic—half of which would be sufficient to keep several labor attorneys gainfully employed or retained for quite some time.

LEGAL ISSUES

I want to focus for a moment on some of the legal issues which affect the use of students or other non-bargaining unit members to do "bargaining unit work." The first issue is what do we mean by bargaining unit work and how do we define the bargaining unit? Any management proposal to utilize students or other non-bargaining unit people to do a job previously done by a full-time bargaining unit employee can and will be met with the union response: You are proposing to let others do our work. The phrase has a ring to it: "our work" "my job." In education, it is not always so clear what "my job" and "our work" is. The problem is not so much that we don't know what the job of the bargaining member is; rather the problem for collective bargaining and concession bargaining is that frequently the bargaining unit member is not the only person who does the work. We know and can describe fairly well what the secretary's job is. Yet if we stop to analyze what we do in a given day, we probably would discover that on a given day we—faculty or administrators—do many of the same tasks the secretary does. We may have some work-study students who are in the same situation. In short, while we know that the secretary does the secretary's job full-time, there are a lot of other people doing the same tasks in a given day, many of whom are not in the bargaining unit.

The advent of technology complicates the issue. The example of Professor X typing his paper on a beat-up typewriter because he doesn't have a secretary is for many a dated example. Professor X isn't typing on a beat-up typewriter anymore. Rather, he is inputting or accessing his data on the computer or revising his paper on the word processor. Does this make him a secretary? Can the secretary's union walk off the job on the ground that non-bargaining unit personnel are doing their work? At Ford or Chrysler, or GM, perhaps. At colleges or universities, I suspect that such a walk-out wouldn't happen.

The problem of a multiplicity of individuals doing "bargaining unit work" and the fact that the technology of the computer and the word processor virtually guarantees this overlapping of function should force labor and management alike to study very carefully the collective bargaining agreement's definition of bargaining unit work as well as the definition of the bargaining unit. Some analogies may be drawn from some of the issues which have affected the newspaper industry over the past two decades. With the advent of computerized typesetting equipment and word processors, the old movie story of the reporter phoning in his story to the rewrite man who pounds out the story on the manual typewriter, yells "copy boy" and the copy boy runs the copy to the typesetter has been rewritten. The reporter types his story into his portable terminal connected by modem and phone lines directly to the computerized typesetting equipment. It's a model of electronic wizzardry. But there is a moral for collective bargaining: what became of the bargaining unit composed of typesetters? The job of the typesetter is still to set type. However, he or she is not the only one doing that job. What is the definition of the bargaining unit for typesetters? What is the definition of bargaining unit work?

As we know, the scope of the bargaining unit is a non-mandatory subject of bargaining; on the other hand, contract clauses concerning the assignment of work are mandatory subjects of bargaining. This distinction has been litigated extensively before the NLRB and in the courts. The cases involving the newspaper industry are of great interest and relevance because they cast a shadow over the issue of multi-functional employees and utilization of non-bargaining unit employees such as students to do work that was previously viewed exclusively as work for the bargaining unit.

A college or university is not a unified operation in which growth or contraction occurs simultaneously throughout the institution. In times of plenty, some units may shrink. Even in times of scarcity, some units—in growth fields—may be expanding. Thus colleges and universities may seek in collective bargaining to have the flexibility to adjust the size of the support staff as is appropriate to the particular unit. Unlike a newspaper with one composing room, we have many units scattered throughout our campus. Some grow; some contract. Each may be a workplace in which students can obtain financial aid by working on a part-time basis. The more students we employ, the fewer the number of full-time employees.

If the collective bargaining agreement permits the college to eliminate positions at any time, this, in theory, gives the college the right to abolish the bargaining unit while still having the bargaining unit work performed by non-unit employees. Traditional contractual provisions against contracting out of bargaining unit work may be written in such a way as to be inapplicable to the use of part-time student employees.

Under these facts, the NLRB has been known to hold that the employer could not validly insist to impasse on a bargaining proposal which, in the view of the NLRB would allow the employer

> unilaterally to determine who is in the unit at any given time. The Board does not certify as appropriate a unit where one party has unilateral control over unit scope. Newspaper Printing Corp., 232 NLRB 291 (1977).

There are cases which go both ways and the issues can become both complex and expensive to litigate.[7] Obviously, litigation can be avoided if concession bargaining is successful. For that reason, I want to mention recent bargaining at Boston University in which this issue was raised.

NON-FACULTY BARGAINING UNITS

Since 1979, Boston University has had collective bargaining agreements with District 65—formerly affiliated with the Distributive Workers, currently affiliated with the United Automobile Workers. The unit represented includes the full-time clerical, technical, and service employees. Both before the start of and continuing into collective bargaining, the University had sought to maximize student financial aid by providing part-time employment to students. The vast majority of these part-time positions involved working side-by-side with, and doing the same job as that done by members of the District 65 unit.

In anticipation of the economic realities facing the University in this decade, the University sought, in its most recent collective bargaining, to insure that it would be able to reduce the full-time work force in this unit as necessitated by the needs of individual units. At the same time, the University sought to insure the ability to continue to utilize students as part-time employees. Reductions in force had already begun to take place in this bargaining unit at the time collective bargaining started in 1983. In fact, at the time collective bargaining started dozens of grievance and arbitration cases were pending involving elimination of positions and not surprisingly, the Union contended in each case that the Union jobs were being performed by such non-unit employees as part-time students and by the faculty. The Union sought guarantees of minimum unit staffing which the University was unwilling to accede to. Ultimately, the parties agreed upon concessions. The expiring contract had provided under "Bargaining Unit Work" that

> Employees outside the bargaining unit shall not do the work of employees within the bargaining unit except to the extent that they have done so in the past.

This clause also provided that

> It is recognized by both parties that both bargaining unit and non-bargaining unit employees may perform the same tasks in meeting their respective responsibilities.

The clause also provided for the use of students. The provision of the contract dealing with "Job elimination" had provided that a job could be eliminated if no longer necessary because of "lack of work or lack of funds." Given the relationship between these two clauses, it was clear that a long and brutal grievance and arbitration fight would continue anytime a position was eliminated unless the work previously done by the incumbent also disappeared.

After long negotiations, the parties reached an agreement. It provides that job eliminations will be accomplished through attrition, when practicable. It provides that when a job is eliminated, any remaining duties may be reassigned to bargaining unit employees, to non-bargaining unit employees as ancillary or incidental duties, or may be reassigned to students. The agreement retained the right of the University to continue "its practice of assigning work to students whom the University may employ so that they may earn part of their expenses while studying at the University." The agreement contains explicit provisions for severance pay due to layoff or optional recall rights in lieu of severance pay. To deal with the Union's fear that bargaining unit positions could be eliminated by converting full-time positions into part-time positions, the University agreed that where a full-time position is reduced to part-time, the incumbent will remain in the bargaining unit.

SUMMARY AND CONCLUSION

The above example represents, to my way of thinking, creative and successful concession bargaining. The result was made possible by convincing the Union that it had more to lose by not making the concession than by making the concession. Resolution of this issue was made both easier and more difficult by the fact that it was a Union issue, not an employee issue. The obvious threat to the Union negotiators was to the size of the bargaining unit the Union would end up representing, since severance and lay-off benefits were already in existence.

The concession bargaining could probably not have been brought to a successful conclusion if the Union had failed to understand the mutuality of interests that the concessions involved. There is no recipe for guaranteed success in concession bargaining. But in my judgment necessary ingredients for successful concession bargaining start with recognition of the realities—these include:

- That there is a problem.
- That failure to resolve the problem will itself create more problems.

College and university negotiators must be able to honestly convince the union of both of these factors. Union leadership in turn must be prepared to openly and honestly evaluate these claims and, I suggest, if convinced of the validity of the claims, be prepared to see the concession demands not as a device for destroying the union but as a device intended to preserve the college or university, and thus their own jobs. Once that recognition is obtained, the union is in the position where it can seek to present its own proposals for dealing with or solving the problem. As long as the union perceives that it is being asked to bargain against itself, successful concession bargaining is difficult. When the union can say—at least to itself—there is an issue here and if we do not seek to solve it now with modest concessions, we will pay a much higher price down the road, the union can see concession bargaining as other than capitulation and surrender. Hopefully, it can be seen as a prescription for survival.

The acceptance of such a role by the union requires leadership by the union because the union will ultimately have to explain to its membership why some perk or benefit was yielded for current employees or made inapplicable to new employees. If the union leadership has not been convinced by the college negotiators that there is a problem, it is unlikely to expect leadership and the willingness to attempt to deal with the issue.

If one of the major factors which justifies concession bargaining is the need to maintain and strengthen the university in the light of the threat of more drastic consequences down the road if concessions are not obtained, we must all remember that the road looks gloomy for the coming decade. Structural reform in higher education collective bargaining during this decade will involve concession bargaining because, of necessity, it will involve the need for labor and management to cooperate in achieving economies and productivity simply to survive the decade.

I do not believe that this closes on a gloomy note. Cooperation and leadership by both labor and managemeent should not be a gloomy prospect. Indeed, one possible outcome of cooperative concession bargaining may be an enhancement of cooperation between employees and supervisors. When employees and their union recognize that the pie is finite and is smaller than it was, everyone has a stake in dividing that pie without waste. When all employees know that income lost or misspent means less income available for their wages or to maintain their jobs, unions and employees can see that they have an important role in concession bargaining, namely, the ability to insure that concessions are appropriate, to insure that concessions are designed to minimize adverse impact on their unit. Thus, this may well be an exciting decade for collective bargaining in higher education and one which brings labor and management closer together in recognizing the mutuality of their interests.

FOOTNOTES

1. Source: *Academe* (July-August 1983). Data for 1983-84 has not been published.

2. "Uncapping the Mandatory Retirement Age," Report of Committee A, American Association of University Professors (July, 1982).

3. Obviously, if one party to the negotiation has the raw naked power to impose its will, it may obtain any concession it seeks. However, for the purposes of this discussion my assumption is that the collective bargaining occurs in a context of relatively equal strength between the parties.

4. See generally, J.J. Healy, (Ed.) *Creative Collective Bargaining* (Englewood Cliffs, N.J.: Prentice Hall, 1965); R. Birnbaum, *Creative Academic Collective Bargaining* (New York: Teachers College, 1980), pp. 154-56.

5. "Uncapping the Mandatory Retirement Age," *supra*.

6. See, "The Use and Abuse of Part-Timers," parts I and II in *Campus Bargaining at the Crossroads*, (New York: Proceedings 10th Annual Conference National Center for the Study of Collective Bargaining in Higher Education and the Professions, 1982).

7. Compare: *Newspaper Printing Corp.*, *supra*, enforced, 625 F.2d 956 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981) and *Newspaper Printing Corp.*, 250 NLRB No. 132, 104 LRRM 1495, enforcement denied, ___ F.2d ___, 111 LRRM 2824 (6th Cir. 1982).

C. 3. CONCESSION BARGAINING: THE MONMOUTH COLLEGE EXPERIENCE

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BACKGROUND

From the viewpoint of labor relations, Monmouth College* has had serious problems since it became a four-year college. The founding president of the institution, although a man of vision and imagination, was highly paternalistic and, when challenged, became authoritarian. While these qualities were useful in both establishing the college during the early years of the Depression and sustaining it as a small, struggling junior college for many years, those qualities became liabilities when broader programs of instruction and more sophisticated faculty from the better graduate schools appeared after 1956. Such junior college practices as faculty signing in and out on a daily basis, a 15 hour teaching load and required substitutions in fields often totally alien to a faculty member's area of specialization caused great friction between faculty and administration. The Monmouth College AAUP Chapter played an important role during those hectic years by providing leadership for faculty discontent and by educating the college Board of Trustees on its responsibilities in leading Monmouth College into the mainstream of higher education.

Following the founding president's retirement, Monmouth College entered a decade of almost unlimited growth. Students appeared as if from nowhere, taxing the existing plant facilities to their limit. On the assumption that there was a bottomless pool of students, Monmouth embarked on an extensive building program, adding dormitories, two large academic facilities and a student center, creating the campus as it exists today. By 1970, Monmouth's enrollment approached 6,000 students including several graduate degree programs.

Like his predecessor, the new president took a dim view of faculty participation in all but the most minor tasks. Few faculty, however, seemed to notice until it became apparent that the enrollment boom was over. During the sixties, for example, the AAUP Chapter languished and finally died leaving the Monmouth College faculty with little but the existing governance bodies which were inadequate for the impending crisis. Shortly before the president's retirement in 1971, the Monmouth College faculty voted for collective bargaining representation under the rules of the National Labor Relations Board, thus becoming the first private institution of higher learning to formally go the union route. Clearly, the major reason for what was at that time a radical step for a college faculty to take, was the perception that the college administration had become management in a corporate sense. From a deep sense of their own impotence, Monmouth College faculty opted for union representation in the hope that, collectively, they could protect their interests.

The new president inherited a potentially explosive situation. The campus was polarized and, although he came from a strong liberal arts background and had a strong commitment to traditional college governance, he soon came to see collective bargaining as an obstacle to the more traditional governance processes. Additionally, problems of enrollment decline, changes in student major preferences and declining revenues intensified the antagonisms. These problems resulted in a three week strike by both the Faculty Association and the Teamsters which represented maintainance employees on campus in the fall of 1979. While negotiations broke down officially on the issue of salary, the major issue, at least for the faculty, was the president's leadership. After much acrimonious airing of the issues in the local press and with the use of federal mediation, the strike ended. The fall semester was saved by the lengthening of class periods in a shortened semester. A few weeks later the president resigned.

To many faculty, the resignation of the president appeared to mark the beginning of a new era. Finally, the Board of Trustees had responded to faculty action....Indeed, a brave new world seemed to have dawned.

The interim president immediately set himself the task of healing the wounds caused by the strike. A personable man with considerable talent in communicating with small groups, he appeared everywhere on campus listening sympathetically to faculty and students. The entire college community was much impressed with his informality and his apparently endless capacity for empathy. In the Spring of 1980, the presidential search committee was presented with a petition which urged the committee to include the interim president's name on the list of recommended presidential candidates to be presented to the Board of Trustees. This was done and in the Fall of 1980, Dr. Samuel Hayes Magill was inaugurated as the Fourth President of Monmouth College.

DEFINING THE PARAMETERS

Little did most Monmouth faculty realize that they were on the threshold of what has come to be known as concession bargaining. The new administration saw long-range planning as its first priority. A Long-Range Planning Committee was quickly formed with board members, faculty, administrators and students participating. At its meetings, this new committee was presented with statistical data, prepared in administrative offices, which pictured the future in the bleakest of terms. With remarkable precision, student enrollment patterns were projected to fall at alarming rates during the coming decade. Such dramatic changes portended serious economic problems since Monmouth was largely tuition dependent for its operating revenues. The committee was assured, however, that courage in making the tough decisions would set matters right. One of the tough decisions to be made was the termination of tenured faculty over the next five years, perhaps as many as 36. Of course, this was to be done in the most humane way possible with particular emphasis on early retirement incentives. Additionally, it was obviously impossible to give tenure to promising young faculty since tenure implied a financial commitment which the institution could not make given the uncertain economic future. It seemed appropriate that the union should consider 3- or 5-year contracts beyond the 7-year probationary period if good young faculty were to be saved. True, this was a violation of the 1940 AAUP Statement on Academic Freedom and Tenure, but President Magill assured the Long-Range Planning Committee that, in his view, academic freedom had nothing to do with tenure. Tenure was, in many respects, little more than job protection which was essentially a medieval guild view. It was necessary,he said, to live in the new world of high tech, computers and corporate planning. O brave new world.

Strangely enough, in spite of impending economic doom, the college administration was spending large amounts of money. Monmouth College entered Division I basketball competition. Neither the Physical Education faculty nor the larger faculty were asked to advise in any significant way on this important step. Outside consultants appeared on campus at considerable cost, to make recommendations on such matters as the advisability of establishing a Prep School on the Monmouth campus, curriculum change and space utilization. New administrators materialized, seemingly out of nowhere and, in the opinion of many faculty, created more problems than they solved. President Magill seemed to consult with a small number of faculty in formulating policy whose chief characteristic was their unpopularity with the majority of faculty. An old word with new meaning began to be used ad nauseam - collegiality. Many faculty saw the word as presaging the announcement of a decision made without faculty input. For many faculty, it was clear that Monmouth College had not overcome its history.

This then is part of the background of the 1983 collective bargaining at Monmouth College which ran from April through November. The negotiating team of the union approached its task with some uncertainty. In the past, the union had drawn up its proposals with great care in rationally justifying its case. The college administration team, in that kind of scenario, seldom, if ever, had its own set of proposals. It generally reacted, almost defensively, to union proposals, making concessions depending on its perception of the mood of the faculty as the opening of the fall semester drew near. This administration, however, had already sent clear signals that it intended to behave differently.

The Faculty Association was fortunate in having as its chief negotiator a professional economist who recognized that negotiations would turn on the question of the financial viability of the institution. If the membership believed that, despite its questionable policies, the college was in genuine financial difficulty, then it would be hard to justify opposition to concessions. If, on the other hand, the union negotiating team could demonstrate that the college's pleas of economic hardship were untrue, then concessions might be opposed with some hope of success. In the private sector, college administrators can obscure financial data more easily than in the public sector where questions of money are a matter of public record. The evidence was confusing. While the college budget showed deficits for several of the preceding years, its IRS returns, which were procured with some difficulty, showed increases in net worth for each of the deficit years. Clearly, it was necessary to prove that the discretionary powers of management in spending money and in allocating it among several funds at will enabled them to put the worst face on things if it was to their advantage to do so. The trick was to prove precisely how this could be done in terms which laymen could understand. The union's chief negotiator, using his considerable professional and teaching skills, not only persuaded the union membership at several meetings that Monmouth College was well above the poverty line, he was even able to briefly convince some members of the administrative team that their evidence of a projected deficit was questionable. This feat was, needless to say, not long lasting. At this early stage of the negotiating process, it was a battle for public opinion which the union clearly won.

RETRENCHMENT OF TENURED FACULTY

The real battle now started. The college administration proposed that the union agree to the removal of ten tenured faculty from several departments where enrollments were low and, on the basis of projections by the Long-Range Planning Committee, were expected to decline substantially over the next five years. Although early retirement incentives and retraining options were mentioned as part of the proposal, it was clear that the administration intended to send termination notices in the Fall of 1983. By contractual agreement, tenured faculty had a year and a half left to teach after receiving notice and then received more than a full year's salary at the time of actual termination. The college then received no financial benefit from ending tenured positions until two and a half years from the sending of termination notices. They justified their proposal on a clause in the contract which provided for termination in departments which were financially exigent. Since none of the departments in question were financially exigent at the time of the administration's proposal, and were only projected to become so in an uncertain future, the college administration was on rather shaky legal ground. But, legality aside, the proposal was a threatening one since no tenured faculty position had ever been terminated in the history of the college.

The union's negotiators were in a difficult position. Finally, all collective bargaining hinges on the question of whether the membership is willing to strike if the terms of settlement are unacceptable to them. Removing tenured faculty could very well prove to be a rallying point for such action, particularly when the faculty was aware of the economic viability of the college. Negotiations, however, were being conducted in the summer, when most faculty were not on campus, so it was hard to gain any clear sense of faculty views. After much debate on the choices available, the union negotiators decided to continue bargaining in the hopee that the team could reach a settlement good enough to recommend to the membership when it reassembled in the fall. A majority of the team believed that an equitable solution was possible even if terminations could be made; several alternatives were available to affected tenured faculty. A minority of the team remained convinced that, under no circumstances, did the financial state of Monmouth College justify the dismissal of tenured faculty. For the minority, an aroused membership would have the final say. In a sense, the radical demand of the college administration for tenured positions had divided the union's team. Bargaining continued, with serious tensions just below the surface, although the team members continued to respect each other and, bound by long associations of friendship and professional camaraderie, each member remained unaffected by ideological differences.

PROLONGED NEGOTIATIONS

Negotiations continued during the summer. Tough bargaining characterized each long session, many of them sidebar with a national AAUP representative present. Shortly after the beginning of the fall semester, a tentative settlement was reached. Although the union team was unenethusiastic about the specific terms of settlement, it nevertheless felt that it could recommend the agreement to the membership. The agreement called for a modest 4-1/2% salary increase with an additional 2% college contribution to TIAA. On the important question of faculty terminations, faculty in those departments where enrollments were expected to decline over the next several years and where positions were not to be replaced, were given the alternative of an attractive tenure buyout plan. If ten faculty accepted this plan, the college administration agreed that it would not be necessary to terminate tenured faculty. In effect, there was considerable pressure on faculty to accept the alternative since failure to reach ten voluntary early retirements meant that tenured faculty would be fired.

Some members of the union negotiating team, although they agreed to recommend the settlement, had serious reservations. If present economic conditions did not justify such harsh measures, wasn't the union, in effect, colluding with the administration in its plans? On the other hand, the proposed agreement was the best that could be reached short of direct faculty action. The team agreed to present the proposed settlement to the membership without enthusiastic endorsement. Ironically, even such a pro forma endorsement did not square with the earlier insistence by the union team that the college was financially healthy and that projected enrollment declines were not inevitable. The entire team agreed that the membership would have to decide the question.

The proposed agreement was presented to the membership at a stormy meeting in early October. A mail ballot was to be sent to individual member's homes following the meeting, so this membership meeting was a most crucial point in the collective bargaining process. It soon became apparent that the group was sharply divided. Those favoring acceptance either expressed fears of the possible consequences of a strike or endorsed the proposal because they believed it to be in the best interest of the institution. Faculty opposed to the contract saw it as an attempt, on the part of the administration, to break the union since the proposed concessions had no basis in economic fact. After an hour of heated exchange of opinion, a motion was made in favor of a strike authorization which failed to carry by a narrow margin. The meeting was adjourned and a divided faculty left the meeting room with the heavy burden of deciding perhaps the most important question in the history of collective bargaining at Monmouth College.

During the next few days, opposition to the proposed contract crystallized. Several members of the unit requested a meeting at the union president's home to discuss their strong objections to the recommended settlement. When they were urged to consider a petition for an emergency membership meeting, they refused, arguing that they preferred to work against acceptance of the proposal through contact with individual members in an attempt to have the proposed agreement defeated by ballot. The constraints of NLRB law made it impossible for union leadership to participatee in any way in this attempt to repudiate a proposal already recommended to the membership. The threat of the charge of an unfair labor practice actually helped produce a genuine grass roots movement within the membership of the Faculty Association. Interestingly enough, some faculty who favored rejection were themselves part of the administration since department chairpersons are not included in the bargaining unit at Monmouth College. Although they could not vote, they could and did urge their colleagues to defeat the proposal. At least one member of the management negotiating team privately expressed the hope that the contract would be defeated. In the week before the ballots were to be counted, a truly interesting situation was developing.

STRIKE AUTHORIZATION VOTE

On October 11, the ballots were counted. The proposed agreement was defeated by a vote of 43-35. Top administration officials were amazed and disappointed. It was at this point that the college administration made a most serious error of judgment. Rather than backing off and moderating their demands in order to reach a settlement, they chose to call special meetings of five academic departments and announced their intention to send termination notices to ten tenured faculty, specifying for each department the number of notices to be sent. Thosee meetings were grim reminders to faculty that the only important question on campus was one of power - the administration had used its power - what would the response of the union be?

A week later a strike authorization vote passed 63-17. The negotiating team was instructed to return to the bargaining table and attempt to reach a settlement which removed the possibility of the termination of tenured faculty. The issue now became a public one with local newspapers airing both sides of the dispute. To a large extent, the union had a clear advantage here. Union releases to the press and radio emhasized that money was not an issue in the dispute and even suggested that financial concessions might be made if this could save jobs. Firing employees with 20 or more years of service could hardly win friends for the college. Administration spokespersons could only put the best face on a policy which, if completely documented, might raise questions in the public mind about the potential of financial bankruptcy. Such questions would not do much for the college admissions office. An important victory then was won by the union in the press.

SETTLEMENT

When bargaining resumed, college negotiators were far more conciliatory than their public rhetoric. Clearly, both sides wanted to avoid a strike. From a union perspective, the only real issue was gaining an agreement which precluded termination of tenured faculty. Sensing the deep feelings surrounding the termination issue, the administrative team soon announced their abandonment of the dismissal plan. It remained only to work out the details of an agreement. The final agreement which emerged over the next month could be characterized as an example of concession bargaining only in the most limited sense. The union agreed to defer one percent of the additional two percent to be contributed by the administration to faculty pension plans until June 30, 1984, the end of the contractual year. This sum, which amounted to about $50,000, was to be placed in a joint escrow fund. If, by the end of the contractual year, five tenured faculty in departments where their positions would not be replaced had not agreed to the tenure buyout plan, the one percent would return to the college's general fund. From the point of view of the union, the worst that could happen was the loss of $50,000, a rather small concession for the saving of tenured faculty positions. In early November, the membership overwhelmingly accepted the new agreement.

SUMMARY

In retrospect, 1983 was obviously a problem-ridden year for Monmouth College. From a faculty perspective, there were gains and losses. One of the gains was the ability of the faculty to come together and save the jobs of colleagues. This had produced a significantly higher degree of faculty self-respect. Union membership has increased to its highest point since collective bargaining began at Monmouth College in 1971. If, as some faculty thought, there was an attempt to break the union, it has failed.

There have, however, been losses, not so much for the union, but for the institution. Faculty mistrust of administration is probably higher than it has ever been. This polarization has resulted in a morale problem which has serious ramifications. Administrative policy proposals for change are evaluated by many faculty at least as much on the basis of the source as on their merit. In short, the college administration has become ineffective in providing leadership for the institution. Given the kind of short run future most private colleges face, this is a most serious handicap. Sadly, it could have been different.

*Editor's Note

The administration of Monmouth College asked the Center for an opportunity to respond to the remarks of Professor Donahue. While it is not the practice of the Center to publish papers in the Proceedings that were not presented at the Annual Conference, we did incorporate the response of Dean Richard Benjamin and Provost Eugene Rossi in the National Center Newsletter, Volume 12, No. 5, Nov./Dec. 1984.

D. 1. THE MERITS OF MERIT PAY: WHERE'S THE MERIT IN MERIT?

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MERIT PAY - THE ISSUE

Advocates of merit pay propose it as a means of reforming the compensation system. Some would argue for its adoption as an incentive to improve performance. Faculty would strive harder, under this view, if they knew that their extra effort would be rewarded by higher salaries. Detractors, on the other hand, view merit pay as punitive to faculty who are doing their jobs. Actually "merit pay" is silent with respect to average performance; it focuses attention on those whose performance is outstanding. In any case, when the academy seeks to punish, it has available more effective sanctions than withholding merit. Promotion and tenure decisions communicate more loudly and more effectively whether a faculty member is fulfilling peer-group expectations. Intrinsic rewards associated with positive peer judgment, recognition within a discipline, desirable class scheduling, and important committee assignments are withheld from faculty members who perform below standard.

Merit pay is also viewed as a means of eliciting specific behavior. Its supporters regard it as a means of encouraging faculty to contribute more to their students, their scholarship, and to their institutions. Its detractors would argue that the specific behavior sought is compliance with institutional policy, support of the administration, silence on controversial issues, and resistance to union activity.

In my judgment, neither argument is relevant. What is relevant, however, is that a system of compensation that is performance based is as fundamental to higher education as is collegiality. Performance based compensation systems have been with us for a long time, so long in fact they are traditional in higher education. I would argue, moreover, that they are essential in all fields in which professionals function with a high degree of autonomy and independence.

Faculty members individually define their own terms and conditions of employment. They define curriculum, choose texts, establish class standards, determine how much time to invest in classroom preparation, and decide issues of the classroom management. Faculty members may or may not seek grants, undertake research, engage in scholarship, commit time to students, engage in community service. They may choose to use non-teaching time for outside remunerated employment or overload teaching. Or, they may spend such time in contribution to their institution, disciplines, or communities which are not compensated beyond the normal salary.

With such freedom to manage their time, faculty members should be rewarded for outstanding achievement when they commit their time, beyond the normative standard, to student, scholarly and institutional interests. Generally, these accomplishments require extraordinary commitments of time which for most faculty members involve personal or financial sacrifice because of foregone income from alternative activities.

The collegial tradition favors frequent evaluation of faculty performance, on appointment, annually until tenured, on conferring tenure, and on promotion. Annual salary reviews and salary negotiations are no less traditions in all private and most public university systems. If this system erodes to the point where there is no connection between evaluation and remuneration, if tenure becomes automatic in the absence of clear competence, if promotion comes to be based on sheer longevity, and if all components of a salary program become automatic, then the compensation system fails to reward excellence and therefore, no longer supports conditions of employment that favor faculty autonomy and independence. If what I have described occurs, faculty will shift their emphasis to activities that supplement salary. Highly qualified faculty will leave to join systems that "fast-track" their promotions and salary increases. Faculty members who strive for institutional recognition or leadership in scholarship and research will come to be seen as deviant or foolish.

MERIT PAY - THE OPPOSING VIEW

So it is that I characterize performance based compensation as fundamental and integral to high quality higher education. Why then are some faculty unions so vigorously opposed to performance based compensation systems, even in circumstances where the pool of discretionary funds is added to the normal or anticipated salary increases?

Part of the answer is in the roots of trade unionism itself. The union movement in the industrial and craft setting evolved, in part, as a reaction against perceived arbitrary actions by management with respect to employees and employee groups. Union leaders fear the potential power and opportunity that the ability to grant discretionary salary increases presents. In addition, if collective negotiations are viewed as a conflict between countervailing powers, which it usually is, the union leadership would want to be viewed by its members as the source of all economic gain.

More importantly, the union is a political institution and its leaders serve by election in a democratic process. Because the number of faculty members who are recognized for outstanding achievement is not large to begin with, they are likely to be only a small proportion of the faculty who elect the union leadership. It is only natural for the union to oppose a compensation system that, by its very nature, offends more faculty members than it directly benefits.

Yet, early union leaders in the academic world argued vigorously that higher education was different from the industrial trade union or the craft model. They asserted that the adaptation of bargaining to the collegial model was essential if collective bargaining was to be successful from the perspective of institutional health as well as faculty well-being. At least, this view dominated the organizing rhetoric. Once the union was actually established, however, the trade union model dominated collective negotiations in higher education. The traditional reliance on peer judgment in the collegial system for appointment, promotion, and tenure is antithetical to the trade union model which functions most effectively in reaction to a hierarchial administrative structure by promoting an egalitarian system that minimizes differences among faculty members.

The early rhetoric was as true as it was unfulfilled. The long-term well-being of institutions was, and is, inextricably intertwined with the long-term interests of its faculty members. The economic well-being of faculty members is enhanced at institutions that attract and retain the very best minds available; the reverse is also true. Falling enrollments mean fewer jobs and promotional opportunities; lost grants reduce revenues; poor reputations reduce faculty mobility; and loss of public credibility means reduced support. Faculty compensation, therefore, is not a zero sum game. In the long-term, support for an institution depends ultimately on the perceptions of students, parents, and the public of the strength of the faculty.

While unions may negotiate for more egalitarian systems, they and their members expect higher education leaders to negotiate with equal vigor for strengthening and extending collegial systems that mandate peer evaluation for recognition through merit increases.

MERIT PAY IN NEW JERSEY'S FOUR-YEAR PUBLIC COLLEGES

In New Jersey, the issue is clearly joined. In our experience, differences among bargaining unit representation and institutional mission have been the most critical influences in patterns of settlement.

Merit pay programs in our public institutions of higher education may be described along a continuum beginning with the merit bonus arrangement, decided in accordance with management procedures for selection, and ending with the establishment of a performance based salary system implemented through a peer review process. Our experience, while dependent on the vagaries of the negotiations process for definition, has been that the type of merit program eventually agreed to is often the one most appropriate for the particular institution.

Three critical elements emerge from an analysis of the variety of merit programs we have negotiated in our four-year public institutions. They are: the nature of the employees represented; the differences in point of view between public and higher educational officials on the management team: and the importance of research and scholarship as part of the mission of the institution. We have found that:

1. Where the bargaining unit is comprised solely of faculty, the bargaining agent is more likely to be disposed toward a comprehensive merit program; and,

2. the greater the influence of the governor's office, the less likely the negotiation will result in a comprehensive merit program; and,

3. the more significant the role of research at the institution, the less hostile the faculty representative is likely to be toward a comprehensive merit program.

There are two levels of decisions to be made in the intraorganizational process of bargaining by the management team. The first is agreement on those aspects which are clearly in the domain of the institutions. The second is the determination of the management position on elements subject to negotiation with the union.

First, what is negotiable? Through a series of court decisions and the resolution of scope of negotiations petitions filed with the Public Employment Relations Commission in New Jersey, standards have been established as to what is, and is not, negotiable under our law. With respect to merit, those aspects which are judged to be negotiable are such elements as the amount of the merit pool; whether awards will be cash bonus payments or part of base salary; and the procedures for selecting meritorious individuals. Non-negotiable items, or those which are clearly a matter of institutional prerogative, are such matters as the criteria for selection; the composition of committees; the levels of review; and the determination of who decides which individuals are meritorious.

Second, how is the management position established? Prior to 1978, the governor's office, which strongly influenced the contract settlements, sought to minimize differences between higher education settlements and other state contracts. The influence of most college presidents (Rutgers excepted) was limited prior to and during negotiations. In preparation for the 1979 contract negotiations, I convened the presidents of all of the colleges and we established academic goals for collective negotiations. The most important of these was to introduce a merit component into all faculty contracts. We needed to persuade the governor's office to support this goal as one of high priority. As a result of our efforts, the first performance based compensation program was successfully negotiated for the state college system in the 1979-81 agreement with the American Federation of Teachers. While that intraorganizational negotiation is ongoing, the last round of negotiations witnessed the office of employee relations strongly supporting this goal which is so important to the state's higher education leaders.

Negotiations for the state college system are highly complex. Each of the nine state college boards of trustees constitute a separate appointing authority, yet, the governor is the legally recognized employer of record. The head of the office of employee relations bargains for the state, and his goals are often at odds with those of the chancellor and the college presidents. In fact, the chancellor and the college presidents hammer out a common position on educational issues and then negotiate with the governor's director of employee relations to establish a common position. As I indicated, the higher education leaders are more enthusiastic about performance based compensation systems than are the governor's people. For this reason, merit pay is a component of public employee contracts only in higher education.

The American Federation of Teachers, which is the duly elected bargaining representative for the faculty and non-teaching professional staff, is organized as a Council of State College Locals. Each local has its own officers responsible to the faculty and non-teaching professional staff at their own state college. While the union leadership generally opposes merit pay arrangements, the views within the council range from indifference, through objecting, to outrage on the issue. Representatives of the state council bargain with the state management team to reach accord on a statewide master agreement. This agreement is dispositive of all terms and conditions of employment for all faculty and non-teaching professionals at the state colleges. Certain procedural elements are delegated to local negotiations at each college pursuant to language in the master agreement. Merit pay issues divide the state council as they do the management group.

With respect to the other senior public institutions, there is a range of examples of bargaining unit composition, though they tend toward exclusive faculty composition. At Rutgers, for example, the bargaining unit is comprised solely of faculty who are represented by the American Association of University Professors. Because of its statutory authority, the university administrators negotiate on behalf of the institution, but they do bargain within the economic parameters established by the governor's office and the department of higher education. Representatives of the governor do not sit at the negotiations table; therefore, academic goals have greater influence in the Rutgers negotiations.

The University of Medicine and Dentistry, formerly the College of Medicine and Dentistry, negotiates with a bargaining unit composed solely of faculty and also represented by the American Association of University Professors, though a different chapter from Rutgers. Until 1981, the director of the governor's office of employee relations acted as the chief management spokesperson and was joined by representatives from the college administration as well as the chancellor's representatives. Now, institutional representatives act as the management spokespersons. The governor's office of employee relations still has representation at the table as do I, and each contributes to the development of the management position. The university's role is the predominant one, however.

The New Jersey Institute of Technology negotiates with a mixed bargaining unit comprised of faculty and non-teaching professionals like that in the state colleges. This group is represented by a local organization called the Professional Staff Association, or PSA. While one of the Institute's representatives acts as the chief management spokesperson, the management position is mutually determined with the governor's office of employee relations and me through my representative. A shared state position best typifies the management view in this circumstance. Set forth below is a description of merit pay and other compensation factors found in the public sector colleges and universities of the State of New Jersey.

A. Contracts Between the AFT and the Four-Year State Colleges

There is some irony in the circumstance that the first performance based system was negotiated for the state colleges with the American Federation of Teachers. The AFT was most strongly opposed to a merit program, while the college presidents saw the issue as especially significant for their institutions.

The 1979-81 AFT agreement provided for a higher across-the-board adjustment than was attained by other state workers. It excluded the automatic longevity increment normally payable on an individual's anniversary date which was, and still is, a component of other negotiated agreements. The merit component had two aspects. First, one hundred and fifty special merit promotions were made available in the second year of the agreement. The fifty percent cap on the proportion of faculty allowable at the professor and associate professor ranks was raised by the board of higher education to fifty-five percent to accommodate this contractual obligation.

The second element of merit was in the form of merit increments which would be paid as part of base salary in half or full increment amounts to individuals judged to be meritorious. The total amount allocated for this dual program was $450,000.

While the state expected that some form of peer input to the process would be negotiated, such negotiations did not produce results. Thus, in 1980, management put in place its own process for selecting recipients. Also acting pursuant to the negotiated agreement providing for merit, the board of higher education adopted criteria for selection as part of the New Jersey Administrative Code (9:2-9.11). These criteria were developed by the college administrators to reflect the goals and mission of the institutions.

The criteria which were promulgated by management were those which are universally recognized as the essential elements of faculty performance: teaching; scholarly/creative activity; research; professional activity; and service to the college. Each of these areas is further defined in the regulations. Teaching, for example, is highlighted as the primary mission of the state colleges. Examples of achievements in teaching include "great influence over one's students; significant contribution to the improvement of teaching or otherwise notably enhancing the teaching activity of the institution."

Certain elements of this contract such as the exclusion of increments and introduction of the merit pay concept caused tremendous strife within the union. For example, there was a short strike by the AFT; the contract was never actually signed by the parties because of the merit provision (although the terms were implemented); and, during the next open period, the representational rights of the American Federation of Teachers were challenged by a competing organization, the New Jersey Educational Association. In retrospect, we were too successful. We achieved too much. The union was not ready for this first step to a comprehensive performance based compensation system. Despite these problems, however, peace was restored, the AFT survived; and the merit pay program was continued albeit in a less ambitious form.

The 1981-83 agreement included the restoration of normal increments to the faculty and non-teaching professional staff. Merit pay was awarded in the form of cash bonuses of $1,000 each to successful candidates. The total merit pool was reduced to $100,000 in each year of the agreement. The procedures used to determine the selection of merit winners were continued from the previous contract.

In the current agreement, which expires on June 30, 1986, the merit bonus concept is continued; however, the amounts of the awards are larger. The new maxima are $1,500, $1,750, and $2,000 in the first, second, and third years of the agreement, respectively. The total merit pool is $200,000; $350,000; and, $500,000 respectively over the three years of the agreement.

The bargaining unit has remained fairly constant at about 3,000. Thus, we have expanded our ability to award merit from approximately three percent of the unit in the 1981-83 agreement, to approximately ten percent of the unit in the 1983-86 agreement. Our goal is to reach about fifteen percent.

A new component in the 1983-86 agreement is the provision for union participation in the selection process. A committee, to be determined by management, but to include union representatives, is to substitute for the first level of review. The intention is to ameliorate some of the concerns raised by the union, such as charges of favoritism in connection with the previous implementation of the merit program. As might be expected, the response by the union has been as varied as the nine campuses on which the locals function. On some of the campuses, the union is actively involved on the committee and very willing to serve in this capacity. On other campuses, the local union chooses not to participate at all. This variety was contemplated in the master agreement. The union still finds merit pay objectionable; yet, it is a compromise they now reluctantly accept.

This merit arrangement is a reflection of the compromises reached within the management team as well as what was possible to negotiate with the union. Our achievement in this regard is supported by the literature with respect to faculty compensation policies. Fred Silander, in his article on this topic cites the fact that, "Industrial and personnel psychologists indicate that for pay to be satisfactory it must be perceived to be appropriate, among other things, in terms of the salary received by others performing in a similar manner."[1] He continues by asserting that, "Since faculty in primarily teaching institutions see each other as doing essentially the same kinds of things, the salary range becomes important in determining faculty morale."[2]

By contrast, Silander maintains that in some situations in higher education, wide differences in compensation may be more acceptable. These situations would be ones in which it is clear that nationally-known, well-published scholars are being rewarded.[3] By extension of this principle, the same would be true for rewarding those faculty who attract large research grants to the institution. This is, in fact, the trend in compensation at our other senior public institutions which have the research orientation not emphasized at our state colleges.

B. New Jersey Institute of Technology

At the New Jersey Institute of Technology, our goal is to create a stronger relationship between good research/scholarship and remuneration than had previously existed. Whereas the Institute formerly awarded only cash bonus merit awards as in the state college arrangement, the current three-year contract calls for three merit components. Cash bonus awards will continue to be made to individuals in the regular salary ranges in each year of the contract. A minimum of $20,000 in 1984, $35,000 in 1985 and approximately $100,000 in 1986 will be available for this purpose. The awards will be in the amounts of $750 to $1,500. In addition, in the third year of the agreement, a new step will be added to all salary ranges. Movement beyond two-fifths of that new step will be based solely on merit and will be added to the base salary. Lastly, in the third year of the agreement most full professors will automatically receive only half the normal increment. The remaining half increment is based on merit.

C. University of Medicine and Dentistry of New Jersey

At the University of Medicine and Dentistry, the current contract moves away from the concept of normal increments. In the last contract, the normal increment was reduced to three-quarters of its previous level. In the new contract, a flat dollar amount has been substituted for "percentage of base" adjustment. These amounts will be paid to all faculty, regardless of rank. The effect is to compress the salary schedules. The amounts negotiated are $1,200, in 1984, $1,300 in 1985, and $1,500 in 1986. The contract also provided for exceptional merit awards in the form of cash bonuses of $500 to $1,500. Approximately $50,000 will be designated for this purpose in each year of the agreement. The other new merit element for the faculty will be implemented apart from the negotiated agreement but is directly related to management's desire to award research activity by the faculty. Research merit awards will be made to individual faculty who attract grants to the institution. The awards will be in the form of significant cash bonuses in amounts yet to be determined. UMDNJ has not sought to introduce merit payments into the base because of the unusually high average salary at the university. However, base salaries include faculty practice and grant income. In this regard, the system is performance based.

D. Rutgers University

Rutgers University has had the best record among our senior public institutions for negotiating a merit pay program. With the introduction of merit, the concept of normal automatic increments was abolished. The salary ranges for all ranks were altered to provide for thirty-six steps as opposed to the usual eight steps. The minimum and maximum dollar amounts however, remained unchanged. Therefore, faculty adjusted to the notion that they could expect an across-the-board cost-of-living adjustment and a small portion of what used to be the normal automatic increments. This expected portion varied depending on rank. Those faculty at the lower ranks were to receive a large portion of what used to be the normal increment (four-fifths), and faculty at the upper ranks would only receive a small portion (two-fifths). The remainder of the normal increment monies was assigned to a merit pool, to be awarded as increases to the base salary of outstanding faculty. This year the pool is one-half million dollars. Additionally, a new "super star" salary range was established. Outstanding faculty members who are currently highly sought may be placed on this new salary range at exceptional salary levels ranging from $60,560 to $80,196. Appointments are made by the administration and ratified by the board.

The Rutgers' program is, in fact, the first genuine performance based compensation system in the state, permitting the institution to attract and retain outstanding faculty.

SELECTION OF RECIPIENTS

While the methods of recognizing meritorious performance at the senior public institutons vary, their criteria for selection are similar, with some minor variations. At the University of Medicine and Dentistry, for example, there are two additional criteria which reflect the uniqueness of the mission of that institution. They are "clinical effectiveness" and "clinical service." At Rutgers, there is a provision in the contract for supplementary criteria to be established at the departmental level by the tenured faculty members. These specific criteria are to be designed to reflect the different "goals, functions, and specialty areas" of the particular academic departments.

The evaluation process also varies among the institutions, reflecting relative degrees of collegiality and differences between teaching colleges and research institutions. At the state colleges, the initial identification of applicants for merit is accomplished either through self-nomination or nomination by the first level of administration not in the bargaining unit, usually the dean. The other senior public institutions also provide for self-nomination; however, more importantly, nomination is usually by one's peers. In this manner, the three research-oriented universities tend to honor a strong collegial tradition.

With respect to the materials used in making the judgment, there is little difference among the institutions. A faculty member may offer self, student, and/or peer evaluations, as well as his or her recontracting or promotion file. Personal knowledge of the faculty member's performance is also a part of the evaluation process and may be emphasized to a larger extent in those institutions which are more collegial.

Lastly, the levels of review involved in selecting merit recipients at the different institutions are varied and depend upon whether there is a research, as opposed to a teaching, orientation. At the state colleges for example, the review process beyond the initial review is totally managerial. The step beyond the recommending committee comprised of faculty and administration is to the appropriate vice president and lastly, the president. Successful applicants are then brought to the board of trustees for final approval.

At the other senior public institutions, the review is first accomplished by a committee composed entirely of peers. The committee is elected at Rutgers, while at the New Jersey Institute of Technology, it is selected by the administration. The names advanced by the committee are then forwarded through the appropriate levels of administrative review including the department chairperson, the dean, the provost or vice presidents, and the president. At each point in the process, new names may be added and recommendations changed. Final action is taken by the governing board.

FAIRNESS AND EQUITY IN SELECTIONS

A strident criticism of merit pay is that fairness and equity considerations are often violated in the evaluation and selection process. Indeed, sometimes the criticism is valid. Is our system fair and equitable? The same procedures are utilized for all applicants thus fulfilling the basic standard of fairness and equity. The criteria are, in all cases, published and/or made available to all potential candidates. At Rutgers, members of the eligible pool actually contribute to the determination of the criteria at the departmental level. Thus, each candidate knows the standard to which he or she will be held. The standards again are the same for all. Also, the range of materials used in the evaluation process are the same for all candidates. Further, the process provides for both self-nomination and nomination by peers and/or administrators. This element guarantees that all eligible individuals can be considered in the process. Additionally, each of our institutions provides for many levels of review. These safeguards are in place to insure that one individual's bias will not unduly influence the review.

Lastly, selections may be appealed. In the state colleges, a person may grieve, through the contractual grievance procedure. any alleged discriminatory treatment, although matters of academic judgment are immune from review. The remedy available to an arbitrator in deciding such a matter is remand to the appropriate level of consideration to correct the problem. At Rutgers, the academic judgment made in the selection also is not grievable. Allegations of violations of procedures at Rutgers are grievable only to advisory arbitration. At the New Jersey Institute of Technology and the University of Medicine and Dentistry, decisions regarding merit awards are not grievable.

Thus, the potential for abuse is held to a minimum. Even so, most criticism of merit claims is that the system is inequitable, subjective, and discriminatory. While all peer judgments are subjective, the peer evaluation system has long served the academy well. Critics of merit pay promotions tend to reflect a fundamental disagreement with merit rather than with how the program is implemented. Even so, the lack of credibility of merit pay arrangements limits their acceptance in collective negotiations.

CONCLUSION

In conclusion, the New Jersey public higher education experience with merit pay has been as varied as the institutions in which the system has been implemented. Our experience is not yet long enough to begin to make some judgments about the success or failure of such programs. However, we do believe that merit pay plans which reduce or eliminate automatic increments and add merit components to base pay work best. They are essential in research universities having a high base salary that foster collegial attitudes and relationships among the faculty. In institutions like our state colleges, where union opposition is still considerable and base salaries are, in my view too low, we are content with a merit bonus award type of program. Our goal is to raise base salaries, to reward the entreprenurial spirit among research-oriented

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faculty, and to recognize those who make a significant contribution directly to our students in the classroom. We can do so only with strong faculty support. That requires their understanding of the importance of the relationship between performance based compensation and the long-term interests of the institution. Fundamental, also, is the need to work hard to assure that the evaluation system is perceived as objective, fair and equitable.

FOOTNOTES

1. Silander, F. "Faculty Compensation Policies," "Issues in Faculty Personnel Policies," 1983, No. 41, p. 30.

2. Ibid., p. 30.

3. Ibid., p. 30.

D. 2. THE MERITS OF MERIT PAY: MERIT DETERMINATION AS A FACTOR OF FACULTY SALARY

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The concept of merit pay can be one of the most divisive issues facing any faculty. At the recently held National Higher Education Conference sponsored by the National Education Association, Professor Samuel Bachrach of Cornell University observed that merit pay represented one end of a spectrum of compensation procedures, which is characterized by subjectivity and effectuated through secrecy. At the other end of this spectrum was the lock step notion of a salary schedule, which he called egalitarian. Mr. Bachrach's conclusion was that neither of these systems offered any panacea for improving the "working conditions" of faculty. After debunking the notions of intrinsic rewards in place of real dollar salary adjustments, Mr. Bachrach did not return to answer the question, "If not salary schedules or merit pay, then what?".

That question should perplex the heart of any person espousing interest as an exclusive representative of faculty. However, to be able to evaluate merit pay, it requires a general understanding of the basis under which salaries are determined.

THE CONCEPT OF A SALARY SYSTEM

I distinguish four basic elements which should be included in any salary system. They are 1) a reasonable base salary, 2) equity between individual salaries, 3) competitive salaries, and 4) salary recognition of outstanding accomplishments. Each of these elements goes into the determination of a salary system whether intentional or by accident. What generally occurs if the system is deficient in addressing one or more of these factors, is that there are trade offs made at the expense of one or more elements, and at a cost of general dissatisfaction with the salaries being received.

1. Base Salary

A reasonable salary base simply reflects the principle that we should provide those in higher education with sufficient compensation to allow for a standard of living commensurate with the value of education to the society. Over the last ten years, most of the effort of organized faculty, whether formally unionized or not, has been directed toward preventing the erosion of the salary base and thus, the standard of living which it can purchase. These problems have been exacerbated by the availability, in some areas, of new Ph.D.s, reductions in the resource base allocated to colleges and universities, and the overall effect of inflation. At times the salary base has thought to include extrinsic opportunities for additional income through the entrepreneurial skills of the individual, and the intrinsic value that the academic work place has to offer. Without belaboring either of these points, neither has kept pace. Further, the opportunity, or need, to moonlight does not serve to offset an inadequate salary, even on a pleasant campus.

2. Equity Adjustments

All other factors being equal, individuals with the same background, education and professional experiences believe that there should be some correlation between their salaries, and the salaries of others in the institution. For that reason, the idea of having systematic equity adjustments appears rational. Where there are substantial divergencies in the salaries being received by similar classes of faculty, the wages become a source of dissatisfaction and there is low morale. I refer to such a condition as relative salary deprivation. It is my experience that even in situations where the salary base is unreasonable, individual faculty can be more concerned with their relative position to others within that base than they are to the overall inadequacies of the salaries being received. The degree of relative deprivation and its impact upon the salary system is directly proportional to the frequency of differing salaries being paid faculty. It is for this reason that so much emphasis is put on equity adjustments.

Equity adjustments are usually driven by increases in the initial salaries being paid to new appointments, which may be forced up due to the pressure of hiring competition. They may also be a factor of the disparate history of prior salary base adjustments, and thus have a relationship to the seniority of the faculty member. Quite often "merit increases," when examined, are in fact equity adjustments rather than rewards for special achievements. Here we begin to see the fundamental interrelationship between the four elements of salary.

3. Competitive Salaries

It would seem logical to expect that a college's or university's salaries must be able to attract faculty to the programs and curricula which they offer. It does no good to have a School of Engineering if you are not able to hire or retain engineering faculty. This has led in recent years to a particular emphasis, or concern, on the part of administrators to include "market considerations" in their salary systems. These inclusions do not necessarily reflect a systematic approach, but rather an ad hoc response to a particular problem area, say for instance Ph.D.s in accountancy. The debate in academia over the idea of market adjustments currently focuses on the differences between professional schools, particularly Schools of Business, Engineering and Computer Sciences versus the Schools of Arts and Sciences (there are some salary differentials within A & S programs, e.g., in physics and mathematics). How does one provide for the needs of an institution to hire, while recognizing that differentially valuing the program offerings of a university may lead to undermining the core curriculum? Market adjustments for new hires leads to the continual need for more equity adjustments for those faculty currently on board, thus driving the competition for limited salary resources. Total faculty salaries is a zero sum game. There needs to be a rational system which provides an ability to hire based upon reasonable accepted criteria, while maintaining a commitment to fundamental principles of university education.

4. Merit Awards

Finally, we come to the concern over our ability to reward outstanding service. The meaning of merit pay increases can vary substantially in degree. At one end, it can simply reflect subjective selection for increments in the base salaries for expected performance. At the other end, merit awards are a form of salary recognition to those making outstanding achievements in their academic fields. The University has long had a system of merit compensation which is reflected in the concept of academic rank and promotion. Peer review by one's colleagues, in the best sense, should reflect a systematic, although subjective, review of the merit of one's teaching and research. The most problematic element of merit pay increases or awards stems from what is perceived as an unfair application of ambiguous criteria. I have found that there are few faculty members who believe that their service is not meritorious, and thus deserving of a merit increase. In part, the problem with this perception is the confusion of merit adjustments with the reasonable expectation of increases in base salaries. Thus, again pointing out the interaction between the various elements comprising the salary dollars paid to faculty.

UNIVERSITY OF HAWAII HISTORY

The history of salary systems in Hawaii, although unique, is not unusual; thus, it is possible to see the development of all four elements in the UH salary scheme. Traditionally faculty members in the State of Hawaii were compensated on the basis of salary schedules. A regular eight-step schedule has been used since the 1960's, and persons could expect regular movement on the schedule unless action was taken by a department chair or dean to deny an increase because of unsatisfactory performance. Subsequently, longevity steps were added to the schedule which provided for salary increments in two-year cycles. The community colleges, then composed basically of the vocational and training schools, were initially under the administration of the Department of Education; however, when they became part of the University of Hawaii System, they brought with them a set of salary schedules which provided for movement between ranges (now similar to ranks) on the basis of attained degrees and years of service.

Early in the 1970's, one percent of the funds coming to faculty were earmarked for "merit." The distribution of these funds varied widely throughout the University System. In one year, there were insufficient funds to provide all faculty with their normal increment; therefore, the merit fund actually was used for selective movement on the salary schedules. In other years, the merit allocations in some schools were rotated amongst the faculty.

With the inception of collective bargaining, salary increases for public employees became negotiable items. The University faculty were the last public employees to select an exclusive agent, and once selected, the first union to attempt to negotiate a contract (the Hawaii Federation of College Teachers) was unable to consummate an agreement with the State. Therefore, the faculty went without negotiated increases. Subsequent to the HFCT's decertification, the University of Hawaii Professional Assembly reached agreement on a contract which provided a substantial across-the-board salary increase.

After a few years of experience with negotiations, the State administration became aware that after public employees had negotiated increases, those who were eligible then received increments on the salary schedule. Legislators felt that this was some form of double dipping, and passed an amendment to the law which provided that public employees were not eligible to increments on a salary schedule in a year in which they received a negotiated increase. They also concluded that it would be best if all public sector employee contracts, from blue collar through the University, expire on the same date in years which coinincided with passage of the biennium budget. This effectively locked all public employees into two-year contracts, and precipitated the notion that all public employees should receive the same wage increase. The impact of both that decision, and its mentality, is the subject for another presentation.

In light of these facts, the leaders of UHPA were convinced that a salary schedule was meaningless; thus, in 1979 they agreed to remove the schedules from the contract and replace them with minimum and maximum windows for new hires and promotion.

In 1980 we began negotiations for a new contract, the apparent dissatisfaction with both the compensation being received, and the method by which salaries were distributed, was quite high. The community college faculty still bristled under the change which had taken place in the range classification, which no longer tied movement to the attaining of academic degrees, but modeled University criteria for promotion between ranks. Due to the erosion of salaries in certain areas, the University administration felt compelled to make adjustments outside the negotiated agreement to "special disciplines and individuals" in order to retain and hire new faculty. By 1982, the substantially uncompetitive wages of the faculty throughout the University System also put pressure on the union to reestablish a salary schedule.

THE ASSEMBLY'S APPROACH

In reflecting upon the salary history at the University of Hawaii and our concern over previously mentioned concepts to be included in salary determination, the Assembly has based its efforts in negotiations upon the following principles. First of all, there must be a level of salaries paid to all faculty which provides a reasonable standard of living. (Currently all forms of fringe benefits are non-negotiable items under the Hawaii State law, although through a recent public sector union coalition we were able to have the Governor commit to supporting a bill before our legislature which would make the premiums of health insurance negotiable.)

Second, in order to provide and maintain the salary base, there needs to be discreet salary schedules which coincide with the expectation of promotion through the ranks. In addition, there must be a sufficient number of schedules to reflect the various subject disciplines, so that shifts can be made based upon the ability to hire and retain faculty. Specifically, the professional schools need to be able to respond to the demands of those professions. The salary schedules should reduce the perception of relative deprivation and decrease the need for equity adjustments. However, in the period of transition, there should be a separate equity fund to provide for movement into the salary schedules.

Third, there should be a way to recognize outstanding achievements by individual faculty members. For this reason, we proposed a fund for merit awards which would be distributed through a set of traditional peer review procedures. The nomination process for such awards are open and not restricted to any particular administrative initiation. The merit awards are not a substitute for the basic salary adjustments. Likewise, awards at ranks less than full professor should have some relationship to promotion, i.e., if you are at the top of the salary schedule for associate professor, your performance should be eligible for promotion not merit. For these reasons, the Assembly has, and will continue, to propose a unified system of salary compensation which includes both schedules and merit awards.

When putting all of these elements together, there are some potential problems and/or choices to be made. One must consider whether merit awards, if they truly reflect some specific achievement, should be in the form of bonuses rather than additions to the base salary, since merit awards will also impact on the disparity between salaries. (Our previous contract made 4 and 8 percent adjustments to the base.) Are the procedures for making the subjective decisions required for merit awards or equity adjustments permissible under federal and state anti-discrimination statutes? One form of inequity which has not been discussed is the disparity between male and female salaries, and their impact on comparable worth, particularly between disciplines when the higher paid discipline is male dominated. Finally, decisions must be made on how to proportion the distribution of funds available for salaries to the various salary elements. It would be imprudent to abandon any one set of adjustments at the cost of another, since this would only exacerbate an institution's compensation problems over the long term.

Unfortunately, in the last round of negotiations in Hawaii, which included both a short strike and a special coalition of all public employees, we did not prevail with the State Administration to include either a new set of salary schedules or merit awards. In fact, there was only a minor adjustment in salaries.

CONCLUSION

I have seldom found, in recent years, many universities (other than the University of Texas at Austin) in a position to fund a comprehensive salary program. This does not mean that institutions are incapable of setting up a rational salary system, but it does mean that their attention is drawn more toward accomplishing one goal (s) at the expense of other factors. Since market and equity adjustments appear to be more immediate concerns, funds are allowed to be diverted from maintaining the salary base in order to fund these factors. Also, if an institution is faced with the inability to provide all faculty with reasonable, incremental adjustments in their salaries, there is a tendency to use merit as a method for choosing among equals those whose salaries will not be allowed to erode.

Even under ideal conditions, acceptance by faculty at large of the concepts and procedures attendant to merit, market, and equity adjustment is quite difficult. The conflicting perceptions of one's self and the basic belief that salaries should be fairly distributed make it difficult, if not impossible, for the unilateral implementation of such programs by administrations without paying a heavy cost in faculty morale. It is for that reason that I believe that collective bargaining is the most appropriate way of developing a systematic compensation system and gaining faculty acceptance of the ideas of merit, market or equity.

The joint decision-making which collective bargaining requires provides the faculty with a share in the responsibility for success. I also believe that the system which is agreed upon must incorporate a set of collegial procedures for determining those to be selected for merit awards. The union is in a unique position to overcome the basic distrust that faculty might have of any system where an integral part of the decisions are subjective. The key to the development and future of merit awards lies in the joint agreement to such procedures, and that agreement in large part will be based upon guarantees that the system is founded in peer review which is not capriciously discounted, and which is based upon preaccepted criteria for evaluation that are fairly applied.

Faculty unions will reflect the demands of faculty at large, but they can go beyond perceived limitations to provide leadership in acceptance of sound principles for salary distribution. The challenge for administrative leaders in higher education is to recognize the value of joint decision-making in this area and nurture cooperation and growth.

V. SEX DISCRIMINATION

A. ON OVERVIEW

B. THE EMERGING CASE LAW

C. COMPARABLE WORTH

D. STATISTICAL ISSUES IN DISCRIMINATION LITIGATION

E. GRIEVANCE CLAIMS: WHO IS WINNING?

SEX DISCRIMINATION
A. WOMEN IN HIGHER EDUCATION
WHERE WE HAVE BEEN AND WHERE ARE GOING: THESE ARE TIMES THAT TRY MEN'S SOULS

Bernice Resnick Sandler
Executive Director
Project on the Status and Education of Women

INTRODUCTION

As everyone knows, the word "men" applies to women as well as men, and so, of course, these are times that try women's souls too. Indeed, change is never easy for either men or women, and certainly the last decade or so has been one of great changes for the world of higher education, particularly around those issues concerning women.

What I would like to do during this talk is to highlight some of the changes that have occurred, as well as some of the remaining problems and issues that still need to be resolved. Looking behind is somewhat exhilarating because the changes that have occurred in so short a time have been rather remarkable in many ways; looking ahead will be somewhat sobering as we realize how much still remains to be done.

When the decade of the seventies began, there were no laws whatsoever prohibiting sex discrimination against faculty, administrators or students. Only a little noticed Executive Order 11246 prohibited employment discrimination by federal contractors, but it was not enforced with regard to sex discrimination by universities and colleges. In 1970, on January 31, Pandora's box was wrenched open when I filed the first charges of sex discrimination in academe under the auspices of WEAL, the Women's Equity Action League. Several hundred more charges were subsequently filed against numerous other institutions, and in response, the Congress shaped a new national policy to prohibit sex discrimination in educational institutions. Title VII of the Civil Rights Act was amended to cover employment in educational institutions. The Equal Pay Act was amended to cover executives, administrators and professionals, which included faculty women. Title IX of the Education Amendments of 1972 was also enacted to cover students and employees in all federally assisted programs. I must say that in those days I was rather naive — I truly thought that if the Congress passed a law, discrimination in education would disappear, perhaps in five years, and I could go on to other things.

ELIMINATING SEX DISCRIMINATION

Alas, women's work is never done; sex discrimination is still a problem although many changes have occurred. First, let me list for you six major accomplishments of the last 12 or 13 years.

A. We now have numerous laws in place which prohibit sex discrimination in education. Indeed, these laws — at least until the Supreme Court decision in Grove City College v. Bell (103 S. Ct. 1181 (1984)) constitute what may well have been the most comprehensive national policy in the world regarding discrimination against women and girls in education. The laws may not always be well enforced (more about this later), but they do make a difference, particularly in the reduction of overt discrimination, the second area in which marked changes have occurred.

B. Most of the overt discrimination in education, particularly those which were formalized by official policies and practices, have largely disappeared. Here is a sample of some horror stories from the past:

- Quota systems for women in graduate and public undergraduate institutions have largely vanished.* For example, year after year at the University of Michigan, the number of undergraduate women was exactly 45% — no more or no less. Similarly, at the School of Veterinary Medicine at Cornell University, the number of women, year after year, was exactly two. In 1983-84, now that students are admitted on the basis of their ability and not on the basis of their reproductive organs, the percentage of women was 60%.
- Official policies treating women students and faculty differently than men have been abolished in most instances. As late as the early 1970's, women faculty on some campuses were not allowed to join the Faculty Club but were invited instead to join the Faculty Wives Club.
- No department now would openly boast about the exclusion of women faculty from its ranks. I have a letter in my files that was sent to me by a woman who applied for a position at one of our finest New England Colleges. The letter reads "Your qualifications are excellent, but we already have a woman in this department."
- Anti-nepotism rules have largely disappeared. Again, as late as the early 1970's there were instances of women faculty with full teaching loads who received no pay whatsoever, because their husbands were in the same department.

- Professional honorary societies no longer exclude women. Prior to the enactment of antidiscrimination legislation, many of the professional societies such as those in the fields of education, music and business did not allow women as members. Excluding women meant that women had less opportunity to learn about their prospective profession and had less professional contacts. Sometimes there was a small women's professional society, but always it was less prestigious.

C. There is now a general awareness of sex discrimination as a legitimate issue in education — an awareness that didn't exist previously. In 1970 when a major educational association was asked to testify on the bill which eventually became Title IX, they refused, commenting that there was no sex discrimination on campus. In the early days of our Project, we received many letters from men and women alike asking us if sex discrimination really existed. No one ever asks us that question any more. People may deny the existence of sex discrimination on their campus but, they can acknowledge that at least it exists somewhere.

D. Women are energized and have organized to work on sex discrimination issues. In 1970, I probably knew of 90% of the women on campus who were actively working to improve the status of women in higher education. That wasn't particularly difficult because there weren't very many of us in those days. Now there are over 100 caucuses and committees within the professional associations dealing with sex discrimination, as well as innumerable newsletters, and more conferences than anyone could keep track of, let alone attend. I remember conversations in early 1970 when we talked about how wonderful it would be if we could have a whole conference about women!

Additionally, statewide organizations of women faculty and campus organizations of women students have sprung up across the country. Women are now a campus constituency. These individuals and organizations represent a critical mass which can make the difference in holding on to what we have and in pressing forward for change.

E. Women's issues have become institutionalized. In 1970, a campus committee on the status of women was not only a rarity, but a rather radical idea. Today, many campuses have a committee for women, as well as a person who is in charge of Title IX and/or affirmative action. Official policies and practices now prohibit sex discrimination in almost all areas of campus activities. Furthermore, there are about 500 campus centers for women, numerous research centers and networks dealing with women, and a large number of special programs for returning women students.

F. Increasingly, the study of women is being included in the curriculum and in research. There are now approximately 30,000 courses offered in women's studies, compared to only a handful in 1969. Over 300 institutions have programs providing majors and minors in women's studies. The incorporation of the new scholarship on women into the mainstream curriculum has been receiving a growing amount of attention, with specific programs to do so inaugurated at several campuses. There is no way of knowing how many faculty have, on their own, included something about women in their courses. This too is no longer the radical idea that it appeared to be in the early 1970's. Furthermore, research on women has increased enormously, although this is still a low status area. Still it is an improvement; in the 1960's, my thesis advisor would not let me write about women. He said "Research on women — that's not real research."

These six changes — legislation prohibiting sex discrimination, the elimination of most overt practices, the increase in awareness, the organizing of women into a campus constituency, the institutionalization of women's issues, and the development of women's studies and research — are major accomplishments. Despite backlash and an unsympathetic administration, there is no way to turn the clock back completely. Even with the Reagan Administration's gutting of Title IX and its broad coverage of educational institutions, it still would be very difficult for institutions to reinstitute much of the overt discriminatory policies which were practiced in the past. Some, perhaps, — but all, not a chance. The climate for women on campus as students, staff and faculty has changed irretrievably.

EXISTING SEX DISCRIMINATION

So much for the good news; now for the bad. Despite all of the changes that have occurred, many women's issues have not changed at all. Indeed, the more things change, the more they remain the same. Set forth below are examples of existing problem areas:

- Despite a marked increase in the number of women in medical, law and graduate schools, most women still major in traditional "female" fields and prepare for traditional "female" jobs.

- Despite an increase in the number of women in the administrative ranks, about 90% of all students attend institutions where the three top administrative posts — president, chief academic officer and dean — are held by men.

- The salaries of women in academe are still lower than those of men with comparable training and experience at every age, at every degree level, in every field, and in every type of institution. On the whole, academic women earn about 85% of their male counterparts. (As bad as that is, it is better than the general population at large, where women working full-time earn about 60% of what men earn. And if you go back to the Bible (Leviticus 27:3-4) the worth of an adult male was 50 shekels; the worth of an adult female was 30 shekels — 60% the worth of a male.)

- Despite an increase in the percentage of women assistant professors, there has been little change in the percentage of women full professors over the last ten years or so, which has hovered at the ten percent mark, i.e. the number of women promoted to full professor has barely replaced those who retired or died. We now have several studies indicating that it takes women longer to be promoted than similarly qualified men, and far fewer of the women are likely to receive tenure than their brothers.

In fact, despite 13 years of so-called affirmative action, the general pattern of women employed in post-secondary education is distressingly the same as it was in 1970:

- The higher the rank, the fewer the women.
- The more prestigious the school or the field, the fewer the women.
- The more prestigious the job, the fewer the women. For example, few women are deans. Instead, they belong to the triple A club — they are Assistant to the Dean, Assistant Dean, or Associate Dean.
- The higher the rank, the greater the difference in the salaries of men and women.

ALLEGED OBSTACLES TO REFORM

Now why is it that with numerous laws, numerous women's committees, numerous women's organizations, Title IX officers, affirmative action officers and a marked increase in the number of women doctorates, that so little change has occurred in the overall patterns and in the number of tenured women? Let's look at some of the reasons given for lack of progress:

1. Higher education is not expanding and budgetary cuts make it difficult for anyone — male or female — to be hired. True, but only in part. Certainly women and minorities do best when the economy is expanding and there is a labor shortage. (In fact, we do best in a war but I don't think we ought to recommend war as a public policy to increase the status of women.)

The argument that it is difficult for women to be hired because it is difficult for anyone to be hired rings less true when one examines hiring rates. Women are still less likely to be hired than men, and more likely to be hired for non-tenure track positions particularly, at the instructor and lecturer levels where the number of women and men are nearly equal. At the other end of the scale, direct appointments to tenure, women are almost invisible. From 1976 to 1980, Stanford University gave direct tenure appointments to 87 people. Of these, only 2 were women. The pattern is the same at other institutions.

2. Another rationale argues that discrimination has virtually ceased but there is still a "shortage of qualified women." Therefore, it is only a matter of time before the increased number of women in the pipeline will advance upwards and achieve parity with men. Again, true, but only in part, for if it were true in full, it becomes difficult to explain why the unemployment rate for women Ph.D.'s in the sciences and social sciences is two to five times that of men. In the humanities, it is even worse: in history, for example, the unemployment rate for women Ph.D.'s is nearly ten times that of men. So while it may be true that in some fields there are not as many women available as men, those women that are available are not doing as well as their male counterparts.

Now all of this may be a bit puzzling particularly, if you have heard that the government "forced" universities and colleges to hire women and minorities, and that thousands, or perhaps millions of dollars were taken away from institutions that refused to do so. Despite myths to the contrary, not one penny of federal dollars has ever been taken away from any institution because of sex discrimination. In fact, the few times that federal dollars were temporarily delayed occurred because of procedural non-compliance, such as not having a written affirmative action plan or refusing to provide the government with information. (Indeed, enforcement of federal laws has been so bad that several women's organizations sued the federal government and won hands down.)

3. If preference was given to a large number of women, the figures certainly don't show it. The myth, however, was that women were being hired in droves and at the expense of white and minority males.

Yet something odd must be going on. All of the changes should have led to marked differences in the employment of women, but did not. Most men on campuses are not Neanderthals but are men of good will who would like to give women a chance to compete fairly. The evidence for this last statement lies in the fact that over the past decade or so there has indeed been a remarkable and relatively peaceful change on campus. The changes occurred not only because of the laws and the pressure from women's groups but because, to some degree, a number of men were willing to change some policies. This is not to say that there is no backlash nor to minimize official academe's resistance to federal policies in some instances. But few men today would overtly or publicly support discrimination against women.

DISCRIMINATION IN A SUBTLE MANNER

So why is it that so few are hired, and still fewer promoted and tenured? One of the reasons lies with the myriad kinds of subtle discrimination — and subtle discrimination is not readily solved by federal laws and regulations. The subtle forms of behaviors are often unnoticed by women as well as by the men who engage in them but they can nevertheless have a devastating effect on the professional lives of women in a variety of ways.

For example, about 25% of administrative positions are filled by individuals who applied directly for a position without any prior connections with the institution or the individuals doing the hiring. The remainder are often hired, in part, because they belong to what women call the "old boys club." This is the informal network of college chums, colleagues one has worked or studied with, friends that play golf together and who may belong to the same all-male "social" club. What happens is that one person calls another and asks, "Charlie, do you know a good guy for the Deanship?" And, of course, Charlie does know a good guy for the job — and he is rarely female. He is almost always a pale male, not because of overt discrimination but because all of us, when we hire people, want to "clone" ourselves. We are most comfortable with people who are most like ourselves. More simply put, men generally prefer other men as colleagues, and are therefore more likely to hire them.

Still another subtle thing that happens in hiring is that men and women are judged differently. Men are more likely to be hired for their potential to do the job. In contrast, women are not judged for their promise but for their achievements, and thus women move very slowly, if at all, in an upward direction. They are far more likely to move laterally than upward.

Let me give you some other kinds of examples. A man who takes firm command of his office is seen as assertive; a woman who does the same may be seen as "domineering." A man with a barbed wit is known as having a good sense of humor; a woman with the same trait may be seen as "hostile." Ambitious men are praised for being go-getters; a similar woman is seen as "unfeminine" and perhaps "too striving." A man who refuses a good job because he doesn't want to disrupt his family is seen as a devoted husband and father; a woman who refuses the same job for the same reason is seen as "immobile" and as proof that married women won't move. If John gets angry at a subordinate, we say he blew his top that day; if Mary does the same, she's "emotional" and probably "menopausal" as well. Moreover, women are seen not as individuals but as representatives for their entire sex. For example, it is still not unusual to hear, "I once had a woman work for me and it just didn't work out; I'll never hire another woman again." Can you imagine someone saying, "I once had a man work for me and it just didn't work out; I'll never hire another man again."

One of the reasons women are judged differently and why it is far harder for a woman or a minority person to be judged as having the potential for achieving is that our culture devalues what women do. There are now numerous studies examining how people evaluate what women do. In one typical study, two groups of college students were asked to rate identical sets of articles. The names of the authors were clearly male or female, and were switched for each group of students; i.e., the articles with female names for the first group have male names when given to the second group, and vice versa. What is interesting is that the students — both men and women — consistently ranked the papers they believed to be written by women lower than those they believed to be written by a male. There is another study where children are given a problem to solve. Almost all of the children solve the task and the observers are to judge whether or not the child obtained the solution by skill or by luck. For the boys in the experiment, almost all of their success is ascribed to skill; for the girls, almost all of their success is ascribed to luck. These experiments and others confirm that women's work is not viewed as being worth very much. Even among primitive societies, we see the same principle at work: although what men and women do varies from society to society, what is consistent is that whatever men do is valued more: if women weave, it is mere woman's work; if men do the weaving, it is likely to be a prestigious activity, perhap even a ritual or a sacrament.

DEVALUATION OF WOMEN

This unconscious devaluation of women means that it is indeed difficult for men — and women — to accurately evaluate the abilities and achievements of women. The same principles apply to minorities as well. Indeed, it is precisely this devaluation that accounts, in part, for the arguments that the standards of academe would be drastically lowered if women and minorities were hired. Women and minorities who were somehow talented enough to receive doctorates from colleges and universities are somehow "not qualified" to teach or work in these institutions, except perhaps at the lowest level. The comment "She's very good, for a woman" indicates our surprise that she can do the job. Everyone looks for a "qualified woman" or "qualified minority"; yet the word "qualified" is rarely used in conjunction with a white male — he is simply a man who can do the job. We assume that white men can do the jobs that really count, and that women and minorities cannot unless they are unusually talented. The old saw that women must be twice as good to get half as far indeed contains more than a kernel of truth. The employment of women on campus will continue to be one of the major problems we will be dealing with for many years to come.

The devaluation of women which affects the employment of women also leads to a second major problem on campus — that of the general climate. There are numerous subtle behaviors that communicate to women that somehow they are not as good — an expectation that lowers their aspirations and dampens their self confidence. Our office recently did a study of classroom behaviors, examining how faculty — both men and women — often unknowingly treat men and women students differently. The behaviors, alas, are generally not limited only to the classroom but can occur whenever men and women are together. Moreover, in most instances neither women nor men are likely to notice that anything unusual has occurred. Singly, these behaviors in themselves may have little effect, but when they occur again and again, they give a powerful message to women that they are not as worthwhile as men nor are they expected to participate fully in class, in college, or in life at large. Some examples of these behaviors are as follows:

- Men get more eye contact than women.
- People pay more attention when men are talking.
- Women are interrupted far more frequently than men.
- Men's opinions are sought out more often than that of women.
- What men say carries more weight. A suggestion or point made by a man is more likely to be listened to, credited to him ("as Jim said"), developed in further discussion, and adopted by a group than when the same suggestion is made by a woman.

These behaviors, although unnoticed by either of the parties involved, are important because they indeed create a chilly climate for all women in the institution whether they are faculty, staff or students. They communicate the hidden message that women are outsiders not only in the academic community but elsewhere as well. The subtle discrimination that women face is perhaps one of the most difficult barriers preventing women from achieving equity.

Men and women often view these subtle forms of discrimination very differently. Too often, many men find it easier to acknowledge and understand overt, intentional behavior. For example, when overt barriers are dismantled, such as when a department chair no longer excludes women from his department, some men assume that the problem of discrimination is now solved. Many women, on the other hand, often view discrimination as being more than just the formal barriers; they see a whole host of subtle behaviors that have a discriminatory impact. Women may view social behaviors, such as male faculty always having lunch together, as having a discriminatory effect because women are excluded from such informal sources of information and the subsequent opportunity to learn more about their profession. Thus, many men overestimate the progress that has occurred because of the ending of overt discrimination; many women, viewing the social behaviors may tend to underestimate the progress that has occurred. Many men think in terms of how far we have come; many women think in terms of how far we have yet to go.

CONCLUSIONS

Our institutions, although they admit both sexes, are not truly coeducational, for we have only let the women in at the lowest level of the institution. The groups with the lowest prestige and power in any institution are the cleaning and dining hall staff, the secretaries and the students, and those are the major groups in which women are found in large numbers.

Women are seeking access not only to the hallowed halls of Ivy but to the mainstream of life, and that is threatening because it gets to the heart of the power base. Many men (and women too) are consciously or unconsciously concerned about the women's movement because they know it will have an impact on all of the relations between men and women. Men may worrry about their relationship with their wives, and there is indeed one of us in almost every house. We are talking about a social revolution that will have as much impact as the Industrial Revolution and the new Technological Revolution.

Much has changed already, but much more needs to be done. We have only taken the very first small step of a very long journey — a journey that will take 500 years or more. There may be delays and difficulty along the way, but we will continue. We will go forward not only because it is right but because so many women care, and so many men care too. We will go forward too because women are learning the politics of change and the politics of power, and the campus, and the nation, and the world will never again be the same.

NOTES

[*] Private undergraduate institutions are permitted, under Title IX, to restrict admissions on the basis of sex. However, after admissions, students of both sexes must be treated fairly.

B. 1. THE EMERGING CASE LAW OF SEX DISCRIMINATION

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INTRODUCTION

I don't believe that anybody can seriously question the fact that women occupy the lower tier in every part of the university structure. While I do think that some men believe that women have made great progress, my reliance on men who hold this view has been colored by my experiences. In a case that I recently tried, a male department head who was urged to consider a woman for his department said: "What do you want of me, I already have an Oriental." I am more than somewhat skeptical of claims of women's progress. I think any of you who have any doubt about women's status ought to go to sources that are objective, reliable and do not suffer from some of the polemic of people like me.

I recommend a report of the National Academy of Sciences of 1981 which described a major study in which men and women who had earned doctorates over a period of time were studied to determine what the difference in their experiences in universities had been. The numbers that come out of the study are overwhelming; there is certainly no question that it is demonstrable through numbers, and through a study which cannot be faulted as biased, that women are simply treated differently and viewed differently, no matter what the level of their doctorates, no matter how fine their publications or teaching experience. The study also dealt with the one remaining question which the critics keep coming back to, saying: well, you can measure length of time since degree, you can measure the discipline in which the person is teaching, you can even measure, because there are standards for doing so, the school from which the highest degree was earned, but how are you going to measure productivity and quality of the work being done by the person that you are observing or studying?

The National Academy Study said that there was concern about that issue, because it seemed a legitimate question; and the authors then referred to information which they had collected, which, they said, suggests strongly that in looking at publication records, of citation counts as measures of productivity, you must be more than ordinarily cautious. The basis for that caution was the enormous increase in the acceptance rate of papers authored by women when pre-publication reviews were conducted with authors' names deleted; that it, an anonymous review policy, resulted in a very substantial increase in the numbers of women's papers accepted for publication in the referreed journals.

SEX DISCRIMINATION IN HIGHER EDUCATION

Assuming that discrimination in higher education is a fact, that it is a demonstrable fact, that it's real, what can be done about it? I agree that all people of good will must concede that it's just wrong, it's wasteful, in addition to being unlawful, and if we all agree to that, then certainly with the resources of the university system, we should be able to eliminate it. Yet, I don't see it happening on a voluntary basis, which I think is most unfortunate. I'm sure that those of you who do anything in administration know that what has happened since the law has changed and has made discrimination against women unlawful is that the amount of paper that has been generated has increased in astronomical proportions. I think also, since the threat of litigation has been around the corner, the paper-keeping or the record-keeping has been much improved in most universities. However, as far as the internal procedures, as far as doing anything at a departmental level, I have not seen any evidence that universities, by and large, are doing anything to police themselves or to make changes, which leaves us with only one recourse.

It leaves us with litigation. My general view of litigating against universities is that it is probably the hardest kind of work any lawyer can undertake; the hardest kind of litigation that any individual or group of plaintiffs can undertake. That is not because discrimination in the academic institutions differs substantially, either in kind or otherwise, from that in factories which have two levels of employment, one for blacks and the other, whites. The wrong is the same; the mechanism by which it is achieved is often a little more subtle at the university level, but why is it so much harder to fight discrimination in universities? Essentially, I think it is because universities have succeeded in getting the courts to accept what I have named "the sacred cow defense." Universities, as health care establishments, enjoy in our society a privileged status. Courts have been persuaded that they are different, that they deserve to be treated differently, that they are serving a social purpose of major magnitude and, therefore, are entitled to a kind of deference, as employers, that no other group of employers or no other kind of employer in our society receives. It is very hard to persuade the courts that they must analyze discrimination in employment in universities as if they were dealing with blue-collar workers in a factory in Arkansas. The effect is essentially the same; people suffer financial discrimination, that is, their salaries or other benefits and their pensions are also different as a result of discrimination; the consequences are precisely the same.

Why then is the litigation so much tougher? There has been a recent decision in the Second Circuit Court of Appeals, which I suggest that those of you who are interested in the problems of litigation in this field read with some care. It was the part of the Cornell class action that was left over after the failure to certify a class. Five individual women's cases were tried in which the women had complained that they had been discriminatorily denied tenure.

The opinion was written by a new judge, Judge Winter, who was himself an academic and had taught at Yale before he was appointed to the Second Circuit bench. In analyzing the decision of the court below finding against all of the women, despite the impeccable or even outstanding credentials of each one of them, Judge Winter acknowledged initially that individual cases are very, very hard. Not one of you, no matter how remarkable or outstanding, really is capable of getting up and saying: "Well, I'm better than all of the others who were granted whatever the privilege is." Not one of us is without in our feet of clay. Judge Winter acknowledges this difficulty of requiring an individual to get up on a stand and say: "I should have been treated the way they are because I'm at least as good or better than they are." He points out that no tenured candidate is without blemishes and resort to illegitimate considerations can be hidden in the midst of the numerous factors which are relevant to a tenure decision.

He does not describe why the making of a tenure decision, however, is so different from giving a person a promotion or some other job benefit in ordinary corporate life. I don't find his distinctions hold, because I think that if you examine upper-level corporate jobs, you're going to find pretty much the same kind of subjective considerations that corporations are obliged to use in granting a benefit, and corporations would not have their decision-making analyzed as the Circuit did the Cornell departmental decisions. What the Circuit said was that tenure decisions are different, partly because of the lifetime commitment. It then added that tenure decisions are really non-competitive; that is to say, if you don't get tenure, it doesn't mean that somebody else will, you are up there for tenure on your own. I think there are a lot of answers to that, and we could probably provide half a dozen, but that's number one in the court's consideration.

Second, university tenure decisions are usually highly decentralized; I think that is absolutely true of almost every major, large employer's decision-making process. The initial decision to tap or promote is from the next level above, so decentralization doesn't differentiate a university employer in my view. Next, the number of factors considered in tenure decisions is quite extensive. I assume that is true when you promote assistant vice presidents to the vice presidency of banks or of insurance companies, so that I don't know that that distinction holds either. Fifth, tenure decisions are a source of unusually great disagreement. Well, I think that the universities will probably concede that they can out-debate any other group of people in society, and I am sure that the academic committees that do debate these questions probably could go at it longer than most corporate committees. These are the distinctions on which the Circuit relied for looking at tenure decisions differently.

PRESENTING THE CASE

The lesson of the case is that in order to present these cases in a way that the Circuit would approve in the future (since the court acknowledged that it has an obligation to look at these questions if presented with them) is that, in the first place, the plaintiffs should show any procedural irregularities such as failure to collect all of the evidence. Second, conventional evidence of bias on the part of individuals would be helpful; that's like having somebody say, well, we don't want women here, and you know how likely you are to get that.

Finally, the court says that given the elusive nature of tenure decisions, it believed that a prima facie case that a member of a protected class is qualified for tenure is made out by a showing that some significant proportion of the departmental faculty or other scholars in the particular field held a favorable view on the question. If all of that happens, then the plaintiff will have made out a prima facie case obliging the university to respond by giving an explanation as to how its decision was reached. I find it interesting that the Court of Appeals was not one bit impressed by the facts. The women plaintiffs presented data showing that during the time period in question, 65% of male candidates were granted tenure as against only 42% of the female candidates. The court found that an insignificant or meaningless statistic. There was a final point which adds to my irritation; there is a hint in this opinion that the tenure decisions have to be made very carefully because there is always the possibility that some better candidate will be just around the corner. I call that "the doctrine of the second coming," and it now appears to have judicial imprimatur in the Zahorik case.

I think that the Cornell case condenses, or makes easy to see, the problems which individual plaintiffs have in trying to demonstrate that they individually have been treated differently from men in their schools and their departments, which is why it is my advice to women on campus that if they believe that there is discrimination, their best bet is to organize, and to bring a class action which will permit the courts to see the broader scope, to see the numbers, where one can demonstrate graphically, and not with humans who get in the way, the difference in the relative positions of men and women.

MELANI v. CUNY

I have been class counsel in two cases, one against the City University and the other against the State University at Stony Brook. I would like to touch briefly on each of them.

The Melani case against the City University was brought shortly after the 1972 statutory amendment which made Title VII applicable to colleges and universities. It took several years, with Mr. Cecere as my adversary, and a very skillful one, to get the judge to certify a class which included people in all of the component colleges of the City University. Thereafter, we made efforts with the University representatives to develop a settlement. The women wanted an effective affirmative action plan; they wanted some guarantee that there would be built into the system a procedure for the hearing and determination of their claims of discrimination in the future. They had no great wish to recover every cent that they believed they had been deprived of by differences in salaries, differences in rank, and for several years, efforts were made to settle. When we were left with nothing but the issue of salary discrimination, the judge did something unusual; he isolated the issue of salary and tried only that part of the case.

The issue that he heard was: Is there discrimination in salary against the female members of the instructional staff at the City University? The case was largely statistical. Although we had some other evidence, the judge relied almost entirely on the numbers that were presented to him. These were the conventional statistical tests of regression analyses and of logit analyses that were done from the ISP tapes which were the computer tapes maintained by the City University, with personnel information, salary, dates of hire and so on. What the conclusion was is that with more people on the instructional staff as of the time the studies were done, and after allowing for all of the variables that the statistician had used, there was an average salary differential between men and women of approximately $1,800, and if one looked at the people who had been hired after 1972 when the statute became applicable, the difference remained significant. It was only modestly reduced; it was $1,600.

The court relied on, and accepted, statistical analyses of the plaintiffs' experts and found that there was discrimination, not only in salary, but he found that there was a direct relationship between discrimination in promotion or assignment to rank at the time of hire which was also reflected in the salary differences. That decision is 13 months old. The judge sent the parties back to try to settle because it seemed to be the sensible course, and I agree with him. Nobody likes to have a very large financial burden imposed on a major university system which educates so many of the kids in the New York area who would otherwise not have an opportunity for higher education.

COSER v. MOORE

The Coser case (Stony Brook) was tried before Judge Pratt, and he found against the plaintiffs. The case is now on appeal. I would like to tell you just what the essential bases for Judge Pratt's findings were because, whether we are able to persuade the Court of Appeals to overrule him or not, it does reflect the thinking of many of the courts in this area. Judge Pratt started by acknowledging that Stony Brook has a sex stratified system, that women occupy the lower ranks, are lower paid and received fewer promotions and tenure less frequently than men. It was his basic conclusion that the reason for the sex stratification was there had been discrimination against women before 1972, for which the present employer could not be held accountable. Thus, it was his view that the substantial salary differences between men and women at Stony Brook which their experts acknowledged existed, could be explained hypothetically, at least, on the basis that women had come into the university pre-'72, were hired or came in from other universities which had discriminated against women, and carried with them their lower salaries. So long as Stony Brook paid them salary increases at the same rate they paid males, Stony Brook was not discriminating. Well, of course, in my view, that consigns generations of women to second-level status, and permits discrimination in salaries for as long as those women live. I think this is wrong; I think it's wrong as a matter of law. When we argued the case before the Court of Appeals, the judges asked how the state explained the $1,500 differential which their own experts acknowledged, and the answer sounded rather flip; it was, well that's just a number the computer throws out or that's just a number the computer threw out and besides you can't show discrimination by regression analyses. That issue, as I say, is now pending before the Court of Appeals.

There is another small point but very directly related to the pre-'72 discrimination elsewhere. We were able to demonstrate, again, statistically, that Stony Brook's use of prior rank when it hired into Stony Brook had the effect of discriminating against women. We were able to show that the prior rank was biased by studying the personnel files, by doing a statistical analysis that showed that women came into universities as new employees holding ranks which were suspect; we showed that the use of prior rank had a very heavy impact or created a heavy burden on newly-hired women. The trial judge said, "Well, that wasn't the only thing they considered." Our point was that there are objective criteria that the hiring group could use, and *to use prior rank* when it is so suspect is, in itself, a form of discrimination. Judge Winter, the same judge who wrote the opinion in Zahorik, was very much interested in the prior rank question and he asked the state representatives whether it wasn't inappropriate to use, since the 1972 legislative history had said to everybody, discrimination is universal throughout the American university system - shouldn't you be cautious about using it? The answer was that the 1972 Amendments gave women the right to sue, it gave them no presumption, and the judge then said, "Do you mean it gave them an empty right?"

SUMMARY

Well, that is going to be the question if the courts are going to say that any carry-over from other discriminating institutions (when there is so much mobility in academic employment), or the carry-over from discrimination before it was unlawful cannot be remedied. We'll have many, many years ahead of this kind of divisive, painful litigation. The squandering of resources that is required by the litigation is mind-boggling. If the hundreds of thousands of dollars that are paid for experts who appear for the universities could be used for something sensible, the universities would have their new science centers or whatever it is they claim they need.

There appears to be the sense that there will be millions of dollars for defense, not one for tribute, without even looking into the merits of these cases. What the universities have going for them is, that generally speaking, plaintiffs in these cases and their counsel are hated. They really hate us. They hate the plaintiffs, they hate the lawyers. Why don't we leave the universities alone? Why are we forcing them to do this? Why are we attacking these sacred institutions in our society? It takes very brave and very committed and generally slightly crazy women to mount these lawsuits. The human waste is unbelievable. Those of you who have any power to do anything back in your own schools, I urge you to recommend the use of some of the money that is being spent in the defense of these cases on internal examination. It will take a lot less money in order to correct the problems; to do your own salary equity studies, to do your own salary corrections, to impose on those intransigent departments some rules as to what their hiring practices have to be, we will all be much better off.

B. 2. THE EMERGING CASE LAW OF SEX DISCRIMINATION

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INTRODUCTION

I have been asked to present a management perspective on the issue of sex discrimination in higher education. I do tend to agree with Dr. Douglas when he suggested that he's not sure that there is a "management perspective." Although, certainly, management does have certain views with respect to the emergence of the issue and where it appears to be going and hopefully, during the course of my brief remarks, I can illuminate some of those views.

In 1974, which was but two years after Title VII of the Civil Rights Act of 1964 was amended to include or encompass educational institutions within its ambit, the Second Circuit Court of Appeals here in New York remarked in a case pending before it, that of all fields which the federal courts should hesitate to invade and take over, education and faculty appointments at the university level are probably the least suited for federal court supervision. I guess in a way the court in that case was acknowledging what has been referred to as the sacred cow defense; the discomfort, if you will, that the courts attach to handling law suits involving employment decisions on a higher education level.

TITLE VII

But, nevertheless, despite that language, the courts have become increasingly, if not significantly involved in employment decisions on a higher education level. One of the chief vehicles that they have used in reaching that involvement has been sex discrimination suits. Now, there are a number of statutes which were enacted in the 1960's and the 1970's which should have suggested at least that that involvement was going to occur.

In 1964, when Title VII was first enacted, it rapidly became the most utilized statute for addressing discrimination in employment; of course, it prohibits discrimination with respect to all terms and conditions of employment on a number of bases one of which is sex. Interestingly, in the deliberations over that bill, a southern congressman who, as rumor has it, was opposed to the legislation proposed that an amendment be made adding the category of sex as a prohibited classification. Up until that point, the bill as introduced did not contain a prohibition of sex discrimination. This congressman felt that if such a prohibition were added to the bill, more than likely it would be defeated because, in his view, there was little support for such a prohibition. To his surprise, the amendment passed, adding sex discrimination to Title VII. Since that time, sex discrimination suits under Title VII have been one of the chief areas of activity in the employment discrimination area.

EQUAL PAY ACT

Now, there are other statutes which were also enacted in the 1960's, one of which is the Equal Pay Act of 1967. That Act prohibits discrimination on the basis of sex by paying employees of one sex less than employees of the opposite sex for equal work. In legal parlance, equal work is defined as work requiring equal skill, effort and responsibility and is performed under similar working conditions.

Those two statutes, Title VII and the Equal Pay Act have been used in addressing pay disparities in higher education. In addition, Title VII has beeen used to redress alleged discrimination with respect to hiring, assignment, tenure or discharge decisions in higher education. I guess involvement by the courts in higher education is not too surprising given those laws. Yet, there are other statutes which, in my opinion and in the view of many so-called management attorneys, have less predictably led to involvement by the courts in higher education.

TITLE IX

In 1972, Title IX was enacted. One of the sections of Title IX states that no person shall, on the basis of sex, be excluded from participation in, denied the benefits of or subjected to discrimination under any education program or activity receiving federal financial assistance. It has been argued that this statute also prohibits discrimination in employment on the basis of sex. However, based on the language I just referred to, the statute seems to address only the problem of discrimination in education, i.e., participation in educational programs, the right to attend school, etc.

In 1982, the United States Supreme Court, in the North Haven case, held that Title IX also prohibits employment discrimination under education programs. Thus, the Court explicitly added yet another statute, if you will, to ensure involvement by the courts in higher education.

Another argument advanced in connection with Title IX was that its prohibitions were institution-wide; that an institution receiving federal financial assistance is subjected to judicial oversight with respect to its employment practices institution-wide, not just under the program receiving the financial assistance. Just a couple of months ago in the Grove City College decision, with which many of you may be familiar, the Supreme Court put that argument to rest. It held that Title IX is program specific, which means that only those employees of a university or college connected to the program receiving the federal financial assistance are covered under Title IX for purposes of protection against employment discrimination. The impact of that decision, as a practical matter, is not as significant as one might expect because employees not connected with the program receiving federal financial assistance would be covered anyway under Title VII. Thus, if they believed they are aggrieved or discriminated against, they could commence suit under Title VII.

MULTIPLE FORUMS

In addition to these federal laws, there are also state laws dealing with the question of sex discrimination. New York State, for example, has the New York Human Rights Law. There is also a New York City ordinance administered by the New York City Commission on Human Rights which also prohibits sex discrimination in employment. Thus, in New York City, claims of sex discrimination in employment can be brought to the New York City Commission on Human Rights or the New York State Division of Human Rights under the local or state law. In addition, an individual can go to the U.S. Equal Employment Opportunity Commission under Title VII.

Filing a complaint with any of those agencies triggers a process by which the institution accused will be requested, if not required, to produce evidence supporting its position that it did not discriminate against the individual involved. That information gathering process can be lengthy and costly to the institution. Not so, necessarily, for the complainant, for the agency, in effect, processes the discrimination complaint for the person making the allegation. So that person does not necessarily have to expend either financial resources or even much time in pursuing her charge. The onus is placed on the institution to come forward with information supporting its position.

At the conclusion of that process, which may eventually include a public hearing, the agency involved, whether it be the New York City Commission or the New York State Division of Human Rights, renders a determination on the merits of the charge. In the case of the EEOC, it would render a finding that either there is probable cause to believe that discrimination occurred or no probable cause to believe the allegation. It also engages in a conciliation process. Title VII specifically requires it. Consequently, many cases which might have gone on to court and might have resulted in findings against the institution are settled before that stage is ever reached.

However, once an individual goes to court, the time, effort and expense rapidly escalates for her and the institution. A couple of points here - number one, once EEOC proceedings have run their course, an individual, upon receipt from the EEOC of a Notice of Right to Sue, has the absolute right to go into federal court and sue on those allegations under Title VII provided it's done within a certain time period. Once an action is instituted, there are certain elements that have to be proven to establish a case and a certain scenario that sex discrimination cases follow.

The U.S. Supreme Court has outlined that scenario. It is the plaintiff's burden of persuasion throughout the proceedings. The individual claiming discrimination must prove, by what we call a preponderance of the evidence, that discrimination occurred. The institution has the duty to come forward with some legitimate explanation for what it did. Technically, it does not have to prove a non-discriminatory reason for its action. Practically speaking, it does not really work out that way. Once an institution comes forward with its explanation, the plaintiff can and will attempt to show that the explanation is false; that it is a pretext for discrimination. If the employer is going to rebut a showing of pretext, it has to come forward with evidence substantiating, yes, proving, in my view, its explanation.

EVIDENCE AND PROOF

The kind of proof that can be introduced on both sides in a sex discrimination suit can vary. It can be direct evidence of discrimination, which is rare; e.g., a statement on behalf of the institution that it will not appoint her to this department because she is female. On the other hand, it could be circumstantial evidence. Circumstantial evidence can consist of statistics. Two recent decisions in New York, however, graphically illustrate the problems attendant to utilization of statistics in discrimination cases.

Mark Twain supposedly once said that there are three kinds of lies; lies, damned lies and statistics. Well, I can tell you that in dealing with statistics in employment discrimination cases, as a management attorney, I heartily agree with that observation. Nevertheless, the courts have specifically sanctioned the use of statistics in employment discrimination cases, many of them involving higher education. The two cases that I referred to a moment ago are the *Melani v. City University* and *Yeshiva University* cases. (See *Sobol v. Yeshiva University*).

MELANI v. CUNY

In *Melani*, female members of the instructional staff sued to redress, among other things, salary differentials they felt were based upon sex. They introduced multiple regression analyses to support their contentions. Multiple regression analyses measure the effect independent variables have on a dependent variable, in this case salary. The evidence introduced by the plaintiff's expert in *Melani* tended to show that the salary differential that existed was traceable to sex discrimination. Confronted with that, CUNY had at least two alternatives: (1) offer a legitimate non-discriminatory explanation for the differential; or (2) attack the regression analysis utilized by the plaintiffs on the grounds that it was either inaccurate or the information or conclusions drawn from it were insignificant.

As for a legitimate explanation, CUNY pointed to the fact that women tended to devote more time to child rearing, had fewer publications and were concentrated in academic fields for which the demand was not great. CUNY offered these "assertions" as justification for the salary discrepancies. The judge in *Melani*, however, quickly dismissed those assertions. He stated, among other things, that those kinds of generalizations, particularly where they were not supported by proof, are not sufficient to rebut a *prima facie* case of sex discrimination.

CUNY then turned to an attack on the regression analysis. The University argued that there were certain variables that should have been included in the analysis which were not. Their absence, according to CUNY's expert, tended to exaggerate the effect that sex discrimination may have had on the salaries. For example, CUNY argued that omitted as variables were faculty members' productivity, publications, quality of teaching and committee work.

CUNY's argument that those factors should have been included in plaintiffs' analysis was rejected by the court. It held that regression analyses need not account for every factor that conceivably might explain differences in salaries. The ultimate result was a finding in favor of the plaintiff class. Of course, the monetary implications of that finding are substantial, if not staggering.

But, compare Melani with the Yeshiva University case. In the latter, the court came to an almost diametrically opposite result. In that case, which also involved claims of sex discrimination in pay, statistical analysis was heavily relied upon by both the plaintiff class and Yeshiva University. In Yeshiva, the variables which CUNY argued should have been included in the plaintiffs' analysis in that case were not included. In Yeshiva, it was argued by the plaintiffs that productivity, committee work, assignments, and publications are, in fact, determined by the employer in that he can control the availability of time to a member of the faculty to devote to those efforts. Therefore, they argued that if you include those factors in your regression analysis, you are in effect "building in" sex discrimination or bias into your analysis. Judge Goettel, in the Yeshiva case, rejected the plaintiffs' argument that the variables should be excluded on the ground that there was no proof to support it. In part, due to the absence of those variables in plaintiffs' analysis, he ruled in favor of Yeshiva. If you are confused, so am I.

These cases and other problems that I see in defending sex discrimination cases involving higher education lead me to conclude that if a university or college is going to be able to successfully defend these kinds of cases, particularly in the area of hiring and tenure, it is going to have to fully disclose the bases for its decisions. That creates problems; the rationale attendant to tenure decisions have traditionally been, and still are, considered to be highly confidential. P & B committee deliberations are highly confidential. But, the substance of those deliberations and the reasons for the decision reached will need to be disclosed in litigation if the University is to be successful. Indeed, the courts have shown a willingness to require disclosure of that information in the appropriate case.

DISCLOSURE OF REASONS

If a university or college takes the position, when confronted with a sex discrimination suit, that it will not reveal the basis for its decision because it is confidential or protected by an executive privilege, it most likely will be required to come forward with that information or lose the case. In a recent New York case, Gray vs. the Board of Higher Education, the judge permitted disclosure to the plaintiff of the basis for the University's decision. In permitting such disclosure, the court gave some guidance on how best a University can control "the publications" of information traditionally deemed confidential and still be able to defend itself when confronted with a sex discrimination suit. The court referred to the recommendations of the AAUP that persons denied tenure should be given, upon request, a statement of reasons for the denial and the University should have in place some sort of "grievance or appeal or review procedure" so as to afford the tenure candidate an opportunity to "clarify" certain things which may have been misinterpreted or to fill in certain gaps in the "product," if you will, that were considered by the committee in reaching the tenure decision. Indeed, the court in the Gray case indicated that if a University had the AAUP recommendations in place, the court probably would not require the University to produce or disclose any information other than what had been disclosed to the individual originally upon the individual's request. It seems to me this approach strikes a balance between the concern for confidentiality on the part of the University and its need to be able to defend itself against a sex discrimination suit.

THE TENURE ISSUE

I have one comment regarding the Zahorik case and one regarding the SUNY decision. (See Coser v. Moore). In Zahorik, the court did acknowledge the difficulty in dealing with and reviewing decisions in higher education, particularly with respect to tenure. The reason for that difficulty is that such decisions involve very specialized areas of knowledge, whether it be for tenure in English or a position in the math department. Most judges would freely acknowledge that they do not possess the expertise to review or judge "a decision in such specialized and technical areas."

Nevertheless, even in Zahorik, the court did get into a discussion and review of the backgrounds and qualifications of the individuals who claimed discrimination. It reviewed, for example, among other things, the personnel files that apparently were before the P & B committee in reviewing tenure candidacies. It reviewed the information that the committee had before it in reacing their decisions. This underscores again what I feel is the need for higher education to come to grips with the fact that to be able to successfully defend these cases, whether it be a tenure case, a pay disparity case, a hiring case, or whatever it is going to have to disclose, in some form or another, the basis for its decision. That represents for me personally a bit of a reversal. I can remember in the early 1970's when I was involved in the Melani case. Our position there was that CUNY should not be required to divulge the reasons for the tenure, pay and other decisions challenged in that case.

In the SUNY case, a major question was to what extent may a university be held liable for actions occurring prior to 1972? That, you may recall, was when Title VII was amended to cover universities among others. It is a thorny question. I subscribe to the view that a university should not be held accountable for actions that occurred prior to 1972. To hold otherwise would, in my view, subject universities to potential liability through, in effect, an ex post facto law.

SUMMARY

Finally, one more point, on the question of costs. I want to emphasize that in many respects, the costs of litigation are greater for higher education than they are for the individuals who commenced the suits. Under the law, as it now stands, prevailing plaintiffs can recoup whatever attorney's fees or costs they have incurred during the litigation from the losing defendant. On the other hand, a prevailing defendant generally can recoup his or her legal fees and costs only where it can be shown that the lawsuit was brought in bad faith; in other words, was frivolous and known to be so by the plaintiff. Not many findings of bad faith on the part of plaintiffs have been made in the hundreds, if not thousands, of cases that have been decided since 1972.

In the final analysis, therefore, it is important for higher education to get its house in order. It must eliminate whatever problems that do exist before they are the subject of discrimination charges or litigation. Everyone stands to gain that way; on the other hand, when these problems lead to litigation, everyone loses.

C. COMPARABLE WORTH: THE MINNESOTA EXPERIENCE

Nina Rothchild
Commissioner of Employee Relations
State of Minnesota

INTRODUCTION

Minnesota is one of the few states that has voluntarily implemented pay equity. The voluntary aspects of the Minnesota program must be contrasted with the experience with pay equity in the State of Washington. Minnesota and Washington are about the same size, and my guess is that they are similar demographically. If you compare the experience of the two states with pay equity—Minnesota with a voluntary program, and Washington with a massive lawsuit—it becomes clear that our way is better. It's nice that when you do something that is right, it is also cost-effective.

To give you some background: Minnesota has about 35,000 state employees. This includes two higher education systems, the state university system and the community college system, as well as the usual assortment of state agencies. Our department is responsible for both academic and non-academic employees in the educational systems, although we do not have any authority over the University of Minnesota, which is an autonomous institution.

Minnesota has a comprehensive collective bargaining law for public employees. The law defines 16 bargaining units for state employees, with the units based on occupational groupings. Eleven unions represent these units, with six of them represented by the American Federation of State, County and Municipal Employees (AFSCME). The six units represented by AFSCME contain both female-dominated occupations, clerical workers and health-care nonprofessionals, male-dominated occupations, the corrections guards and the craft and labor workers. Public policy in the state has always been firmly committed to the collective bargaining process, and it was necessary to design our pay equity program within that framework.

PAY EQUITY PROGRAM

The history of Minnesota's comparable worth activity begins in the 1970's. A number of studies focused on the status of female state employees, forming the background against which pay equity initiatives were later considered. The terms pay equity and comparable worth are used interchangeably here.

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In 1975, an AFSCME contract required the state to study jobs and salaries in clerical versus nonclerical classes. In 1976, the state Council on the Economic Status of Women was established. This legislative advisory group conducted two public hearings on state employed women. In 1978, the Legislative Audit Commission completed a year long comprehensive evaluation of the state personnel system, including the relative earnings of men and women. In 1979, the Council on the Economic Status of Women conducted another study and published a follow-up report.

Each of these studies documented a pattern of lower pay for the state's female employees, although no explicit comparable worth analysis was made.

In 1979, the Department of Employee Relations and Hay Associates established a job evaluation system to measure the content of jobs in state service. Although the contract with Hay Associates was not undertaken for the purpose of conducting a comparable worth analysis, the installation of the Hay job evaluation system made such an analysis possible for the first time.

In October 1981, the Council on the Economic Status of Women established a task force on pay equity to examine salary differences between male and female jobs. When the Task Force received a list of state job classes showing their Hay points and salaries, there was a remarkably consistent pattern of paying "women's" jobs less than similarly evaluated "men's" jobs. Sometimes they were well below the trend line for male jobs and sometimes they were closer to the line, but there was not a single case where a predominantly female job was paid on the trend line or above it. In a way, the sheer consistency of the pattern was the most compelling evidence we had of sex-based wage discrimination.

In March 1982, the Task Force's report was published. The report recommended that the legislature appropriate money to eliminate wage disparities between female-dominated and male-dominated jobs rated equally valuable under the state's job evaluation system. The cost for immediate implementation was $26 million, equivalent to about four percent of the state's total payroll.

The legislature responded to the study by enacting comparable worth legislation for state employees in the 1982 session. The law established a comparable worth policy and a process for implementing comparable worth pay adjustments. The policy statement reads:

> It is the policy of this state to attempt to establish equitable compensation relationships between female-dominated, male-dominated, and balanced classes of employees in the executive branch. Compensation relationships are equitable within the meaning of this subdivision when the primary consideration in negotiating, establishing, recommending, and approving total compensation is comparability of the value of the work in relationship to other positions in the executive branch.

The procedure for making comparability adjustments was designed to be on-going. The Commissioner of Employee Relations reports to the legislature every other year, the report to include a list of female-dominated classes which are paid less than other classes with an equivalent value. The report must also include an estimate of the cost of eliminating these disparities. Funds are then allocated through the usual legislative budgeting and appropriations process as earmarked funds in the state department's salary supplement.

Appropriated funds are allotted to the different state bargaining units in proportion to the total cost of implementing pay equity for employees in job classes represented by that unit. Actual distribution of pay equity increases, like other salary increases, is negotiated through the usual collective bargaining process. However, any pay equity funds not spent revert to the state treasury.

IMPLEMENTATION FOR STATE EMPLOYEES

In 1983, the legislature appropriated $21.8 million for the 1983-84 biennium to begin implementation of pay equity for state employees. This amounts to a little over one percent of the state payroll per year. If a similar amount is appropriated in 1985, pay equity can be implemented by June 30, 1987. This would be consistent with the original pay equity cost estimates of four percent of payroll, or one percent per year for four years.

The state then negotiated with each of the 16 bargaining units representing employees, and the two-year contracts, including pay equity increases, were signed in July 1983. As a result of this first round of bargaining on pay equity, approximately 8,000 employees in about 150 job classes received pay equity adjustments in addition to other salary increases. All clerical workers and about half of the health care workers received equity increases. For both groups, the average pay equity adjustment was a net increase of $1,600 annually by the end of the biennium. There were no reductions or freezes in salaries for male-dominated jobs.

The University of Minnesota was not covered by this legislation because they did not have a job evaluation system in place. They were affected by it, however, because of a prior law which requires that University civil service employees be compensated on a comparable basis with executive branch state employees. In this "piggy-back" way, therefore, University non-academic employees fall under our program and did, in fact, receive pay equity adjustments.

SUMMARY

With that overview of our program, I'll stop here except to list the factors which I think helped it go so smoothly and fast in Minnesota.

First, a foundation had been laid. There had been a series of studies over the years showing persistent disparities between the average wages of men and women. The time was ripe to address these disparities.

Second, a job evaluation system was in place. Clearly, if you don't have a system in place, it is difficult to identify how much of the wage gap is due to discrimination and how much is due to other factors. The Hay system has always been considered a management tool, and we were simply following good management practices by paying according to the value to us as an employer.

Third, we addressed the issue through joint problem-solving. We did not get into adversarial relationships, either through litigation or through labor unrest. The Task Force on Pay Equity consisted of those who would be affected, and we made our accommodations and concessions in a positive climate. We agreed that we had a problem, and we agreed in good faith to try to solve the problem.

Fourth, we kept it simple and pragmatic. It is true that anything within a large and complex system can easily get bogged down with details. You can find job classes where the pay might get out of line. We can find occasional classes where there is a supply and demand factor. You can always find little "glitches" here and there in the system. We focused on the large picture, and I think this more than anything else helped us cut through the complexities.

Finally, we built an implementation process into the on-going legislative process. We are always going to have a State Department's bill. We are always going to have a Governor's budget. We are also going to have appropriations for salaries. Our program is not an add-on, but is part of the on-going process. At certain points during the legislative session, publicly-elected officials have to decide in a public forum whether of not they are going to pay people a fair wage.

In sum, a certain amount of pragmatism, simplicity, common sense, and good will can go a long way in solving the problem of wage disparities.

APPENDIX A

PAY EQUITY — THE MINNESOTA EXPERIENCE

Background

Minnesota state government has about 34,000 full-time employees working in more than 1,800 job classifications. State employees are covered by the Public Employment Labor Relations Act, which defines 16 bargaining units based along occupational lines. Eleven unions represent these units, with six of the units represented by the American Federation of State, County and Municipal Employees (AFSCME). About 86 percent of the employees in state government are covered by collective bargaining agreements.

In 1979, Hay and Associates, a personnel consulting firm, and the Department of Employee Relations established a job evaluation system to measure the content of jobs in state service. The Hay system assigns points to jobs based on four factors: (1) know-how, (2) problem-solving, (3) accountability and (4) working conditions. The "value" of a job is determined by adding up the point value for each of the factors. The cost of designing and implementing the Hay job evaluation system was about $85,000.

In October 1981, a task force was established by the Legislative Advisory Council on the Economic Status of Women to study pay practices for male and female employees in state service. On the task force were members of the House and Senate, representatives of the Department of Employee Relations, union representatives and members of the public. Using the Hay job evaluation system, the study documented salary disparities between male-dominated and female-dominated job classes and recommended that the legislature appropriate money to eliminate the disparities. The estimated one-year cost for full implementation was $26 million, an amount which is equivalent to four percent of the state's payroll.

In 1982, the state legislature changed the personnel law covering state employees to: (1) establish a policy to provide "equitable compensation relationships between female-dominated, male-dominated, and balanced classes of employees in the executive branch" and (2) establish a procedure for making comparability adjustments.

- By January 1 of odd-numbered years, the Commissioner of Employee Relations submits a list of female-dominated classes which are paid less than other classes with the same number of Hay points. Also submitted is an estimate of the cost of full salary equalization.

- The Legislative Commission on Employee Relations recommends an amount to be appropriated for comparability adjustments to the House Appropriations Committee and the Senate Finance Committee.

- Funds are appropriated through the usual legislative process for comparability adjustments. These funds are within the salary supplement, but may be used only for salary equalization according to the job classes on the list submitted by the Commissioner. Any funds not used for this purpose revert back to the state treasury.

- Appropriated funds are assigned to the different bargaining units proportional to the total cost of implementing pay equity for the persons in the job classes represented by that unit. The actual distribution of salary increases is negotiated through the usual collective bargaining process.

Results of Pay Equity Legislation

In January 1983, the Department of Employee Relations submitted to the legislature a list of female-dominated occupations which were underpaid in relation to the average salary for male-dominated classes at the same point level. The legislature approved the list of job classes eligible for pay equity adjustments.

The legislature then approved a biennial appropriation of $21.8 million. This amount was designated separately from funds appropriated for general wage adjustments for all state employees. If a similar amount is appropriated in 1985, pay equity will be implemented within four years. The money was allocated to units based on the cost to each bargaining unit to bring classes within that unit to equity.

Most union contracts have now been signed. Some of the results of collective bargaining on pay equity are as follows:

- Approximately 151 job classes got pay equity increases.

- About 8,225 employees received pay equity adjustments.

- All of the clerical workers will receive on average an additional $1,601 over the biennium as a result of pay equity.

- Half of the health care employees will receive pay equity raises averaging $1,630 over the biennium.

APPENDIX B

COMPARABLE WORTH — SUMMARY

The wage gap between women and men is one of the oldest and most persistent symptoms of sexual inequality in this country. The persistence of the wage gap illustrates its relative immunity from significant economic, demographic, and political changes.

The single most important cause of the wage gap is the concentration of women in a narrow range of low-paying, sex-segregated occupations. Only a small part of the earnings differential between women and men can be accounted for by differences in education, experience, labor force commitment, or other human capital factors.

Supreme Court and federal court decisions explicitly state that Title VII of the Civil Rights Act applies to wage discrimination cases. Claims of wage discrimination are not limited to claims of equal pay for equal work. Any employer who has job classes which are predominantly male or predominantly female, and where there is a consistent pattern of lower pay for the female classes, is vulnerable to court challenge under current law.

The principle of equal pay for work of equal value has emerged as a means to eliminate sex-based wage discrimination. Job evaluation systems have been in place for many years which provide a way to assess the value of a job. These systems are designed to provide internal equity among jobs in a particular workplace.

Opponents of comparable worth continue to raise familiar objections to the elimination of wage discrimination. Three code words are used: "market," "apples and oranges," and "cost."

The "market" argument is that wages are established by the "neutral" process of supply and demand. The argument, however, does not differentiate between supply and demand and prevailing wages. Supply and demand affects wages in only a few specialized or highly technical occupations, and there is little evidence to show a relationship between the number of applicants for a job and the wages for that job.

The "apples and oranges" argument is that it is not possible to determine objectively the value of two different jobs. While it is true that determining the value of a job is not an exact science, the fact is that employers regularly compare jobs. Employers have always compared dissimilar jobs by paying different wages for those jobs.

The "cost" argument asserts that we must perpetuate wage discrimination because the cost of correction would be too high. The simple answer to this argument is that cost is not a defense to unlawful discrimination. And even if this were not the case, estimates of cost for correcting wage discrimination are often grossly exaggerated.

Opponents often claim that comparable worth is inconsistent with collective bargaining. Such claims overlook the fact that there are already many laws affecting collective bargaining. No one would claim that the Equal Pay Act or minimum wage laws prevent collective bargaining.

Sex-based wage discrimination is still widespread because discriminatory practices have been embedded in our wage structure. Objective job evaluation systems and wages based on the value of work can break this cycle of discrimination.

D. STATISTICAL ISSUES IN DISCRIMINATION LITIGATION

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INTRODUCTION

In Melani v. CUNY, the plaintiffs produced a mass of statistics consisting mainly of regression studies of salaries and logistic regressions of rank. Variables used were those accounting for education and experience, either directly or as proxies. The judge found CUNY to be guilty of sex discrimination against its female faculty.

In Coser v. Moore, the SUNY case, the plaintiffs produced a mass of statistics consisting mainly of regression studies of salaries and logistic regressions of rank. Variables used were those accounting for education and experience, either directly or as proxies. The judge found SUNY Stony Brook to be not guilty of sex discrimination against its female faculty.

One might think that the difference was that in one case the differences between men and women faculty were statistically significant while in the other case they were not. Far from it—they were highly significant in both cases. What then made the difference? The judge in the Stony Brook case talked of deficiencies in plaintiff's technique—the failure to run an ordered logistic regression, but in fact, the opinion makes clear that he does not believe that statistics by themselves prove discrimination, especially not in higher education cases.

Let us step back and take a look at litigation as it involves statistics. I shall confine myself to how to use statistics to build your case or defend it and how the courts are likely to receive the statistics, subject always to the vagaries of the court system. I shall talk only about employment, particularly since Grove City has at least temporarily derailed litigation on behalf of students. Moreover, I shall confine myself primarily to issues of discrimination relating to faculty matters, although many techniques have applicability to other professionals employed in higher education.

DEFINING THE CLASS

Of course, the first thing you need to decide in preparing a statistical case is whom to include. If it is a class action, one should have a definition of the class as a starting place, although that may well not be all there is to it. If one has an individual plaintiff, statistics may still be probative, but it is tricky to decide what sets of statistics will be helpful or probative or for that matter admissible. In other words, who is similarly situated to the plaintiff or may be subject to the same discriminatory acts by the same people who affect the plaintiff must be determined.

I do not want to spend too much time on this, so just let me illustrate: suppose the class is all women employed during a certain period who hold faculty rank. Suppose, however, that there is a sizeable group of those holding faculty rank who do not have the traditional classroom teaching, research and committee service duties. Perhaps they are research faculty, faculty who only occasionally teach a course and who may be funded largely by soft grant money. Perhaps they are librarians, perhaps an occasional registrar, or counsellor or what have you, has faculty rank. How to deal with them depends a lot on how many of them there are. For example, if there are a lot of research faculty, it is probably a good idea to do a separate salary study of them and to combine the results with the results for the more traditional teaching faculty. If we include the teaching and research faculty in one overall study, we want to be careful to use some sort of variable to identify each group separately so that the difference in their duties, responsibilities, etc., is accounted for. Other sticky questions are how to deal with faculty whose appointments are less than full-time or with those on nontenure-track appointments. In fact, the issue of who gets on nontenure-track appointments is frequently a major one in a case.

DEFINING THE ISSUE

Once we have decided whom to study, what do we want to study? Here we can be guided by what the issues are in the case, although some lend themselves to statistical study much better than do others. Typically, the issues are salary, promotion, tenure, appointment to administrative positions, granting of sabbaticals and other leaves, assignment to graduate v. undergraduate courses, research support and occasionally differential treatment in the provision of office space, secretarial help and other amenities. Some cases invole hiring, but not many; more commonly they involve differential initial placement in ranks or in nontenure-track v. tenure-track positions.

The issues best suited to statistical analysis are salary, promotion (or more generally rank), tenure, and initial placement. The records are rarely good enough to say anything globally about granting of leaves—particularly since requests frequently are halted at the department level, assignment to courses, etc. In individual cases, there may be proof of discrimination in theses matters, and they are things which are covered in Title VII's broad coverage of terms and conditions of employment.

Insurance and pensions are also covered as compensation under both Title VII and the Equal Pay Act, but the issues there have pretty much been resolved in the courts, except for the issue of how equalization in pension benefits will occur. I could speak to that subject alone for an hour, but I shall skip it entirely unless someone wants to ask questions later about the current legal status of TIAA-CREF and other pension plans.

In order for differences in compensation to constitute discrimination under the Equal Pay Act, a man and a woman must be doing work equal in skill, responsibility, and effort, under similar working conditions. This has usually been interpreted in faculty cases to mean that faculty have at least to be in the same department and probably at the same rank. There is also a case, Hein v. Oregon College of Education, which says that the comparison needs to be made, essentially, of the woman against the average of male comparators, not against a selected one (or more) comparator(s).

STATISTICAL EVIDENCE

The only statistics that are probative in this type of case are simple averages of the salaries of comparators. Institutional statistics can be compiled, in the fashion we describe below, but it is not clear how useful they will be. Thus the techniques I shall be describing apply primarily to Title VII claims. Let us look first at the issue of salary. One can present simple average salaries for men and women, or for men and women by rank, or for men and women divided up by those who have doctorates and those who do not, or by division, or by department in the case of large departments which have enough women so that the procedure makes sense. One can then compute whether or not the difference in salaries is statistically significant. I should say that it usually is, at least if the groups are fairly large. However, a word of caution about averages. While they should be presented, not too much should be read into them, and in fact, not too many average salary figures should be presented. The judge, and certainly the defense, will understand that averages do not tell a lot. The qualifications of the men and women may be very different. The women in general will have less experience and will, at most institutions, be less likely to have doctorates. They will also be concentrated in disciplines which are less well paid, such as nursing and English, rather than business and engineering.

One should, then, present the averages as a rough indication of what the situation is, and then ask whether the differences can be explained by differences in qualifications or "market factors." Which brings up a controversial issue—are market factors a legitimate consideration or should all faculty be considered to have the same job, that of college professor, and thus be paid the same (subject to experience and education, etc.)? Or, to put it bluntly, what about comparable worth? It is my view that plaintiffs will never get anywhere under existing law with a comparable worth theory in faculty cases. If the judge is not aware that it is difficult to hire computer scientists and accountants, the defense will certainly bring the fact to the court's attention. Thus it is essential to control for discipline or market factors in any study of faculty salaries.

Hence, I recommend one salary study controlling for objective qualifications of education and experience and another controlling for these as well as for discipline. Now, how do we control for these factors? In other words, how can we be sure, and make clear to the court, that we are comparing apples and apples, not apples and oranges? The technique we use is called multiple regression. Assuming that you did not come here today for a lesson in elementary statistics—no matter how much you may need it—I shall refrain from going into details. Let me just say that it is a technique which allows us to study the effect of several independent variables on a dependent variable, in this case salary. What in fact we usually use for the dependent variable is the natural logarithm of salary because that studies a multiplicative effect, rather than an additive effect. It generally works better because salaries increase by percentages.

What about education variables? Generally, it is safest to use a dummy variable (value 1 for possession, 0 otherwise) for doctorate and in an institution where there are sizable numbers without a master's, another for master's. To begin with, for experience we can use the number of years at the institution under study. However, for prior experience frequently the information is not available or is incomplete or unreliable. Thus we use several proxies: year since highest degree, age. If the college we are studying hires a lot of people without doctorates then one might want two variables for experience at the institution: one for years there with doctorate and one for years without. Prior experience can be similarly distinguished.

The next problem is to control for disciplinary differences or "market factors." We can either use a dummy variable—1 you are in a department and 0 you are not, or we can run regressions separately in a single department or group of closely related departments. In general, the method of using dummy variables is more satisfactory; there is always the issue of appropriateness of the grouping if you group and few departments are large enough to run a regression on them separately.

A few more words about statistics: we frequently report that observed differences in salaries between men and women are statistically significant at some "level" or another. That simply measures the likelihood of getting a difference that large or larger by chance. Statisticians and courts worry about numbers of standard deviations, levels of significance, and whether a one- or two-tail test is appropriate in a given situation.

The Supreme Court has more or less spoken on this issue, and with their usual preciseness and clarity have announced that two or three standard deviations are an indication that something other than chance is at work. The problem is that there is a big difference between two and three standard deviations. For example, using a two-tail test on a normal distribution, we note that a difference equal to two standard deviations has about a one in twenty chance of occurring at random, whereas a difference of three standard deviations occurs about one time in a thousand. The moral of the story: report number of standard deviations and probabilities and explain what they mean in the context in which they are being used. Judges understand means very well, although they may not believe that they show very much; they may not understand all of the theory of multiple regression, but they do understand that it is a generally accepted technique for studying salaries and other quantities where you want to control for the effects of a number of variables.

I should like to introduce a word of caution: statistics, even when highly significant, do not prove the existence of discrimination. That is a conclusion for the court to draw. The statistician can only point to large unexplained differences—technically speaking, we reject the hypothesis that such results could be due to chance. That, of course, always leaves some other factors, factors not included in a particular analysis. These are likely to be subjective factors; in some sense, once the objective factors are in the regression equation, what we are measuring is the impact of the subjective part of the salary setting process at an institution.

Whether one can thus argue that the subjective salary setting process has a disparate impact as well as arguing that in the process women suffer disparate treatment (clearly paying similarly qualified people different salaries to do the same work is that) is doubtful. Courts have generally held that there must be some specific procedure, some criterion rather than a whole process, to trigger the disparate impact theory.

REGRESSION ANALYSIS

There are two different ways to run a regression to study the effect of sex on salaries. One is to put in a dummy variable for sex and get a coefficient for it—it tells the amount of difference gender makes when all other variables in the equation are controlled for, just as the coefficient for doctorate gives the dollar effect of the possession of a doctorate. One thing we should note about regression equations is that they are not prescriptive; they do not tell how salaries should be set, they tell how salaries are set statistically. The general form (assuming only two variables, one for experience and one for education) would be

$$Y = b(0) + b(1)\ x\ (1) + b(2)\ x\ (2) + b(3)\ x\ (3)$$

where b(0) is the base salary, b(1) is the education coefficient, b(2) the experience coefficient and b(3) the sex coefficient and x(i) are the variables for each of these. Thus a typical predicted salary might be

$$Y = 20{,}000 + 2000\ x\ (1) + 500\ x\ (2) + 1300\ x\ (3),$$

which means that the effect of having a doctorate is 2000 dollars, the effect of each year of experience is 500 dollars and the effect of being male (if 1 = male and 0 = female) is 1300 dollars.

It turns out that a prediction equation may be misleading if women are clustered at lower qualifications and men at higher. It is therefore a good idea to run a males-only regression as well, a regression which simply predicts women's salaries from men's. The technique is the same, except only males are included and there is no sex variable. One also runs a females-only regression to predict men's salaries just to be sure that there are not overpredictions both ways.

OTHER VARIABLES

What about other variables? In particular, what about subjective varibles like quality of research and teaching? First of all, reliable information is rarely available; moreover, it is difficult to use a quantitatve measure—no one thinks that just counting publications is really enough and the one index sometimes derived from teaching evaluations may measure something, but it is not clear what. More importantly, however, in cases where we have had information available and have done a regression run including it, we discover that it does not contribute much—in either of two ways we use to tell how good a model we have. First, the size of the sex coefficient is little altered. Secondly, the measure of fit, called R-squared, is improved only a very little. In other words, publications and teaching variables add little to the prediction. Others have tried to use a measure of the quality of a doctorate through using the ratings of graduate schools now widely available. The problem is that such information may not be available, and it is not clear how much such a measurement contributes, particularly after the faculty member has been on board a few years.

RANK AS A VARIABLE

This brings us to the issue of whether or not to include rank as a variable. Rank is a variable which is under the control of the institution and thus may be subject to the same discriminatory process as salary. It may be a "tainted" variable which merely masks the effect of sex discrimination. In addition, it is a qualitatively different variable, being itself a reward variable, like the salary it is being used to measure, rather than a qualification variable. Nonetheless, it is generally a very good predictor of salary and the wise statistician is prepared to show that it is tainted if she chooses to exclude it from her equation. There are several ways to deal with this.

One method is to do a straightforward study of rank as the dependent variable. Since it is a discrete variable (has only a few values), we cannot run a regular regression unless we choose to code rank by the average salaries of males in the rank. This technique has something to recommend it as it gives the dollar amount of discrimination in rank, but a better technique is to convert ranks to a dummy (zero, one value) variable and use logistic regression. We usually do this in several steps: 1) 0 is instructor and 1 is everything else; 2) we include only assistant professors and above and 0 is assistant and 1 is associate or full; 3) 0 and 1 on associates and full only. We can also use a categorical logistic regression which allows us to use a dependent categorical variable with more than two values.

There are other possibilities for the analysis of rank as well, but all of the methodologies share a problem. .The defense will assert that many rank decisions were made long before the liability period for a particular suit and in fact, before 1972 when universities came under Title VII and that therefore, rank can be studied only by looking at actual decisions on promotions during the period of liability. Case law is difficult to interpret because it is not clear whether a faculty member should be considered to be turned down for promotion in every year in which he or she meets minimum eligibility requirements and fails to be promoted or whether some other analysis needs to be applied. One can, of course, do a rank study on only post-1972 hires. Moreover, one can do an initial placement study on the rank at which people hired post-1972 or during the liability period were placed when hired.

Having said all of this, we do probably still need to study promotions during the relevant period. Here the difficulty is in deciding whom to include. It probably is not good enough to look only at actual promotion decisions; an alternative is to look at the percentage of faculty in, say, the assistant professor rank for five years or more who were promoted in a given year.

Other issues that come up in salary studies are how to deal with part-time faculty and how to deal with tenure-track and nontenure-track appointments. Of course, if part-time faculty are in the class and are like full-time faculty except in their time commitment (unlike many so-called adjunct faculty who just come in and teach a course) one converts their salaries to a full-time equivalent and includes them. But should we have a dummy variable for full-time v. part-time status? I would say no, because that status is under the control of the institution and its use may again mask discrimination. Similarly for nontenure-track faculty v. tenure-track faculty. However, here, if it is an issue, a logistic regression study of initial placement into the two tracks is called for. A logistic regression study of tenure status in general may also be called for (tenure, tenure track not-yet-tenured, nontenure track).

If tenure is an issue in the case, one needs to study tenure decisions as well as tenure status. The problem is of course that while a simple comparison of success rates for men and women who come up for tenure decisions is necessary, it may not be sufficient. One has to survive for a certain period of time in order even to be considered for tenure. To study the dropout rate, as well as to compare the progress of those hired at the same time, we can do a cohort study. We take everyone hired in a certain year and note, preferably at least seven years later, how many have tenure, how many are still around without tenure, how many were promoted and how their salary growth compares.

This is, of course, only an overview of how statistical analysis can be used. Courts are becoming more and more sophisticated and more amenable to relying on statistical evidence, but it needs to be prepared and presented with a great deal of care.

E. GRIEVANCE CLAIMS: WHO IS WINNING?
WOMEN VS. ACADEME

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Faculty members of both sexes are becoming more litigious. In 1790, a professor brought the first suit against an American college; since 1950, according to one legal scholar, there has been a 500% increase in the number of suits brought by academics (Yurko, 1980). The presence of anti-bias laws purporting to protect women has resulted in the largest number of suits brought by American workers in American history. But, according to another legal scholar (Bartholet, 1982), "the brilliant light of Title VII inquiry" has been cast much more readily on personnel policies affecting blue collar workers than on those affecting professionals and managers.

Among professionals, academics are additionally disadvantaged because judges so often defer to decision-makers in academe, especially, it appears, when the plaintiffs are women (Berger, 1980; Flygare, 1980-81; Friedman, 1981; Ginensky and Rogoff, 1976; LaNoue, 1981; Vanderwaerdt, 1981; Vladeck and Young, 1978; and Young, 1978).

In this paper, I shall review the steps women grievants take when they are confronted by a negative hiring, reappointment, or tenure decision. Next, I shall trace the passage of their cases through internal hearings, reviews by State and Federal agencies, and finally, to litigation in court. I shall conclude with observations based on a review of 250 grievances brought by women against their academic employers since 1970, focusing on the effect of the grievances on the women who filed them and on their institutions.

THE INTERNAL GRIEVANCE

Individual women faced with a negative decision at the point of hire, reappointment, promotion, or tenure for reasons they believed to be related to their sex typically seek to resolve the problem at the lowest possible level. Although much research evidence suggests that appointment and promotion decisions are frequently sex-biased (Ahern and Scott, 1981; Cole, 1981; Fidell, 1970; Guillemin, et al., 1979; Nieva & Gutek, 1980; Simpson, 1970), individual decision-makers seldom acknowledge that their decisions might have been. At this juncture, grievants sometimes provide more information about their qualifications, in the hope that the negative decision can be reversed without outside help. If it cannot, plaintiffs proceed to try to use the grievance procedure (if any) in place at the college or university level. Three problems surface here. The first is that the process is time-consuming and expensive in emotion. As one dean has noted, "Gradually, as the grievance process stretches into weeks and months, (grievants) may even develop a kind of paranoia....It is common for complainants to begin to suspect the motives of even those people who have kindly volunteered their time and expertise to serve as counselors in the grievance process" (Boring, 1978). More than one plaintiff has refrained from mentioning that she believed that there was sex discrimination involved for fear of antagonizing her senior colleagues. This is hazardous because if resolution cannot be found at this low level and she must pursue her grievance further, she will find herself accused of opportunism if she brings in the sex discrimination issue later.

A second problem is that if the institution uses a grievance mechanism sanctioned by the American Association of University Professors, the review of the decision must be confined to questions of whether or not appropriate procedures were followed by the original decision-makers. Questions of the merit of the candidate are specifically excluded from such procedures (AAUP Policy Documents, 1977).

The third obstacle is that many procedures do not provide for fresh review of decisions by persons other than the original decision-makers. An exception to this rule is Harvard's grievance procedure (Fraser, 1981). Reviewing procedures in place at many other institutions, two analysts (Davies and Davies, 1981) have concluded that "The mechanisms for investigation vary widely, are frequently vague, and usually heavily weighted toward the administration."

STATE AND FEDERAL AGENCIES

Failing to find satisfaction inside the institution, grievants sometimes proceed to seek outside help from a human rights commission or the Equal Employment Opportunity Commission. One plaintiff (Abramson, 1981) has noted that the act of filing outside the university lessens the chances of internal resolution favorable to the plaintiff. But, she notes further, if one does not file before a designated Federal or State agency in timely fashion, a court can rule against one on those grounds. This plaintiff's case has been under investigation by regulatory agencies for fourteen years. In recounting the various investigations and reinvestigations she has been subjected to, she notes that the location—the University of Hawaii—might have made it a particularly inviting site for travellers representing the Federal agencies. A case which moved along more speedily was that of a professor at another university who filed a suit in 1976 claiming unequal pay practices. The lower court refused to accept her evidence of university-wide pay discrepancies, a decision which was reversed by a higher court. This case produced fewer visits of investigation, perhaps because of its location: the University of Alaska (Brown v. Wood). Decisions reached by Human Rights agencies are typically exceedingly slow in coming and, even when favorable to the plaintiff, frequently disregarded by universities and by the courts to which plaintiffs must next turn.

THE COURTS

Grievants who receive "right to sue" letters from the Equal Employment Opportunity Commission are free to proceed to court, if they can afford to do so. Legal costs are high; unemployed women have few resources and sometimes have had to resort to selling T-shirts and holding bake sales to raise funds to pay their attorneys. Defendant institutions deploy not only their own legal counselors but augment them with outside help. How expensive this is to them is illustrated by the few cases women plaintiffs have won: at Brown University, $1-million in legal fees (Wehrwin, 1981); at the University of Minnesota, an estimated $5-million in total fees (Perry, 1983).

The most telling case against a university arises from a class action rather than a charge by a single grievant. A class action is a suit in which one or more plaintiffs is certified by a court as representing a whole class of women "similarly situated." Federal rules require that in order to be certified, the women demonstrate sufficient "numerosity," "common questions of law or fact" (often interpreted to mean that they are all complaining of sex discrimination by the same employing institution), that they satisfy "typicality" (i.e., they are truly representative of the claims of the group), and that they have "adequacy of representation" (counsel able to represent them and claims not antagonistic to one another's). At Brown, the University of Minnesota, City University of New York, the University of Oregon, and at Montana State University, class actions were certified; on many other campuses, judges have failed to find that the women plaintiffs satisfied the requirements. At Michigan State, for example, five women faculty gained class action status but later lost it when the university argued that the disputed decisions were made in individual, autonomous departments and not by the university as a whole. The judge noted that he could not certify the women in each department because there was "insufficient evidence of the requisite numerosity in such an approach." Thus, no class action at Michigan State because the university was deemed to be too big and decentralized but the departments within it too small with too few women.

A second barrier women plaintiffs encounter is that judges are loathe to intervene in tenure disputes, even after plaintiffs have spent years of preparation for trial and judges have conducted many weeks of hearings. In the Green v. Texas Tech University case, the judge ruled he should not substitute his judgment "for the rational and well-considered judgment of those possessing expertise in the field." In Clark v. Atlanta University, the court declined to second-guess "such a subjective determination" as a tenure decision; in Sanday v. Carnegie Mellon University, the judge said he decided to "decline plaintiff's invitation to tell Carnegie Mellon University how to run its academic affairs." Similarly, in Johnson v. University of Pittsburgh, the court ruled, after a trial lasting seventy-four days, that decisions about tenure should be left to "the Ph.D.s in academia."

A third obstacle women grievants encounter is a fairly widespread hostility to their claims on the part of the judges themselves. In Cussler v. University of Maryland, the judge, in ruling against the plaintiff, remarked in open court, in front of the jury, that the suit did not belong in court and that sex bias laws should perhaps not be on the books. In Faro v. New York University, the judge, in ruling against the plaintiff, ridiculed both her and her efforts with these words: "Dr. Faro, in effect, envisions herself as a modern Jeanne D'Arc fighting for the rights of embattled womanhood on an academic battlefield facing a solid phalanx of males and male faculty prejudice."

ADDITIONAL PROBLEMS

At every step, grievants are hampered by lack of information since academics place a high value on confidentiality in decision-making. If the women cannot know who voted against them and why, they are disadvantaged in terms of defending themselves against the charge that they were unqualified. In one case (Blaubergs v. University of Georgia), a professor went to jail rather than reveal how he voted in a disputed tenure decision. Adherence to confidentiality increases the imbalance in power between the individual grievant and the institution. Robert Davies of the University of Pennsylvania (Davies and Davies, 1981) reported that at his institution one woman's dossier was subpoenaed by the court and later published. The outrageous things people had said about her were made public. The case was decided out of court and the plaintiff awarded back pay and the promotion she had been denied. "I don't think we need to fear disclosure so much," Davies said. "Faculty members live together the way people live together in families. Bad things happen, but they are forgotten and we go forward."

If confidentiality is a problem for plaintiffs in academic sex discrimination suits, a bigger barrier is widespread distrust of those who pursue women's studies as a speciality or who are vocal advocates for women's rights. In a recent case at an Ivy League institution, thirty women appended affidavits to a legal brief detailing difficulties they had encountered as Assistant Professors. Analysis of their histories revealed what they had not mentioned specifically: fully two-thirds of them had either taught a women's studies course, presented a women's studies seminar, served as a member of the administration's committee on the status of women, or as a member of the campus women's caucus.

A third issue has to do with a lack of objective standard for evidence. As one plaintiff has noted:

> When you look at the way judges have ruled and the few consent decrees that have been shaped, you see that it is very, very individualistic. The judge in the Montana case accepted a certain kind of evidence as proof of sex discrimination. It is exactly the same kind of evidence laid out in the Sharon Johnson case at the University of Pittsburgh, where the judge said, 'Sorry'...The fact is that the evidence of sex discrimination is almost the same—at all universities and colleges...same kinds of evidence about statistical representation of women, the same kind of expert witnesses...but the decisions are quite different. (Abramson, 1981)

Under-representation of women faculty in higher education is clearly not an isolated phenomenon. Affirmative action goals must be based on analyses of availability. Many institutons, in setting these goals, demonstrate that in a number of fields there are so few women Ph.D.s that it is unrealistic to expect them to have any women in these departments. Plaintiffs typically seek to show that women are under-represented even in fields where there is high availability. Here, differences develop over what constitutes being qualified for openings. At a given institution, plaintiffs may attempt to show that women and men are promoted at different rates. The institution's lawyers seek to impose short time spans on these studies on the grounds that otherwise the evidence is "time-barred." In many institutions, comparisons, even when adequately carried out, tend not to be statistically significant, or barely so, because there are so few women.

Another line of reasoning often advanced by grievants and their attorneys is that the women passed over for promotion are better qualified than the men who were promoted during the same period. Several judges have refused unequivocally to compare credentials, counting such evidence as irrelevant. An example is the judge's ruling in the 1983 case of Zahorik et al v. Cornell University:

> Even if plaintiffs were able to prove that they were better qualified than 'comparable males'...plaintiffs' case would have to fail..."

He explained that Title VII does not require that the best qualified person be appointed or promoted, but only that the decision not be tainted by sex discrimination.

SUMMARY AND CONCLUSIONS

Of the 250 grievances reviewed for this study, only a handful have succeeded in court. Some have been resolved at earlier stages but the vast majority of grievants have not found satisfaction through internal reviews, agency hearings, or the courts.

Women turned down for tenure in the humanities and "soft" social sciences—where most of the women are—are disadvantaged in looking elsewhere for employment in comparison to candidates turned down in specialties for which there is high demand in academe and elsewhere. Some grievants leave their original disciplines to seek retraining in law or business; others stay in their fields by accepting temporary or part-time appointments at other institutions. A fortunate few move to tenure-track or even tenure-bearing posts at other institutions, almost always, however, colleges of lesser prestige than those they had to leave. Three complicating factors are that women married to academic men lack mobility in that it is difficult to find two good academic posts open at the same time at any single institution. A second complication is that the job market is tight in the 1980s, especially for other than entry level posts and particularly in certain disciplines. A final problem is that plaintiffs, having accused their colleagues of sex discrimination, are unlikely to be able to count on them for help in finding either administrative posts at their own institutions or assistance in being placed elsewhere.

One conclusion from this study is that individual grievants cannot carry their complaints through to conclusion by themselves. They need local help from a support group or a union and national help from colleagues elsewhere or from organizations such as the American Association of University Women or the Women's Equity Action League.

A second conclusion is that grievants in sex discrimination suits seldom benefit from them. In light of this evidence, can women be said to be winning? Yes. Plaintiffs seldom overturn decisions in their own cases but their complaints serve to sensitize academic institutions to the existence of sex discrimination. Procedures for evaluation reviews are clarified; new mechanisms for fair hearing of grievances are instituted; sometimes a college ombudsman's office is founded; subsequent decisions are carefully scrutinized—all to the benefit of junior women (and men) who come after. Women have had to leave Princeton, Harvard, Cornell, but they have not gone quietly. At every institution where brave women have protested injustice, more women now have tenure and better protections than ever before.

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*The above listed cases were referred to by various speakers who addressed the topic of "Sex Discrimination." While no claim is made that the table sets forth a complete listing of the case law on the subject, it does provide the reader with citations to the cases mentioned.